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DEDICATION TO LARRY S. BUSH

Michael H. Hoffheimer

In December 2001 Professor Larry Steven Bush retired after twenty years active and distinguished service on the faculty of the University of Mississippi School of Law. Professor Bush taught a generation of students Comparative Law, Employer-Employee Relations, Labor Law, International Human Rights (Workers' Rights), Contracts, Civil Procedure, Comparative Labor Law, and International Law. He also served as Acting Dean (1989-90), Associate Dean (1996-98 and 1987-89), and chair or active member of most faculty committees, including the Law School Hiring, Curriculum, and Admissions committees and the University Graduate Council, Undergraduate Council, and Faculty Senate.

An international legal consultant,¹ Professor Bush presented papers at national and international conferences from Bangkok to Bucharest.² His published scholarship successfully fuses his practical experience as a labor litigator with his academic expertise in comparative law.³ He was promoted to full professor in 1994, ap-

¹ Most recently he was retained by the American Center for Labor Solidarity in July, 2000 to support Romanian trade unions drafting a new version of the Romanian labor code. He also repeatedly worked as consultant both for the United States Department of Labor and the Free Trade Union Institute of the AFL-CIO in providing employee rights training in Yugoslavia, Thailand, and Romania.

² In addition to continuing legal education presentations, he has presented papers to or moderated at seventeen conferences from "Union Organizational Campaigns in the Catfish Industry" (at the Conference on Critical Legal Studies in Washington, D.C. in 1999) to "Labour Law and the Future of Industrial Relations" (at the Trade Unions and Industrial Relations in Central and Eastern Europe seminar, Berlin, 1999).

³ See, e.g., Larry S. Bush, *Romanian Regulation of Trade Unions and Collective Bargaining*, 32 CORNELL INT'L L.J. 319 (1999); Larry S. Bush, *Collective Labor Disputes in Post-Ceausescu Romania*, 26 CORNELL INT'L L.J. 373, 420 (1993); Larry S. Bush & Swan Yerger, *The Trend Toward Alternative Dispute Resolution*, 25 MISS. LAW. 11 (1988); Larry S. Bush, *Labor and Employment Law (Fifth Circuit Survey)*, 18 TEX. TECH. L. REV. 633 (1987); Larry S. Bush, *My Brother's Keeper—Some Observations on Federal Rule 23 and Mass Tort Class Actions in the United States* (pts. 1 & 2), 5 CIVIL JUST. Q. 109, 201 (1986); Larry S. Bush, *Customers, Coercion and Congressional Intent: Regulating Secondary Consumer*

pointed Fulbright Lecturer at the University of Bucharest during his sabbatical leave in 1991-92, and named Visiting Scholar and Visiting Professor at Cornell Law School during his sabbatical leave in 1998-99.

Professor Bush single-handedly created the Cambridge Summer Session in 1982, serving as the program's director in 1982-89 and 1993-2000 and teaching in the program. Only due to his devotion and real sacrifices by his family did this summer session survive and flourish, operating successfully every year from 1983 to the present and successfully passing four ABA inspections.

Outspoken on legal and political issues, Professor Bush tends to be quiet as to his own accomplishments. Many students and colleagues know him as a sharp critic of aspects of American foreign policy, but few know he was a commissioned officer in the Army from 1968-71 and received the Bronze Star for service in Vietnam as Intelligence Officer.

Born May 3, 1946, in Ozark, Alabama, Bush attended Cocoa High School in Cocoa, Florida, where he played varsity football and was elected all-county co-captain. There, in seventh grade, he met Marilyn Cobb, whom he married eight years later.⁴ He majored in Political Science at the University of Florida, received a B.A. with Honors in 1968, and was inducted into Phi Beta Kappa.⁵

After his military service he attended the University of Florida College of Law. He graduated in 1974 with high honors and as a member of the Order of the Coif. Radicalized by his military experience, he worked during law school for a firm that successfully defended one of the "Gainesville Eight" who was being prosecuted for militant antiwar activity.

Professor Bush worked in the Office of the General Counsel of

Boycotts Under the National Labor Relations Act, 86 W. VA. L. REV. 1127 (1984); Larry S. Bush, Book Review, 53 MISS. L.J. 381 (1983) (reviewing JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, *AGRICULTURAL LAW* (1982)). Professor Bush also collaborated on three editions of ABA SECTION OF LABOR & EMPLOYMENT LAW, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS AND THE NATIONAL LABOR RELATIONS ACT* (Patrick Hardin ed., 4th ed. 2001).

⁴ Professor Bush recalls loving her from the moment she traded her desert for his canned spinach. Marilyn Bush was subsequently to earn an M.S. in Nutrition and served as instructor in the Department of Pharmacology at the University of Mississippi.

⁵ Professor Bush was a charter member of the Phi Beta Kappa chapter established at the University of Mississippi.

the Tennessee Valley Authority (TVA) from 1974-78 before pursuing graduate legal studies at the University of Cambridge, from which he received an LL.M. in 1979.⁶ He returned to the TVA for two years, becoming a senior trial lawyer responsible for labor and other employment litigation,⁷ before joining the University of Mississippi law faculty.

A cultured man whose passions range from highland hiking to spectator sports, Professor Bush is a patron of local artists, a connoisseur and collector of Oriental rugs, and an accomplished cook with a particular flare for Cajun and Creole cuisine.⁸

A white child of the segregated South, Professor Bush grew to hate even the hint of racism and has devoted much of his adult life to political and social movements for better race relations and social justice. He was a prominent spokesperson in recent years for the local movement for a Living Wage for low-paid and predominantly African-American workers. Select examples of his activity are: lobbying members of Congress for funding for the Thurgood Marshall Legal Educational Opportunity Program (2000); serving on the program committee for the Public Forum for the President's Initiative on Race (1998); voluntarily teaching an overload course (without pay) at historically black Jackson State University (1991); co-chairing the national symposium on the Civil Rights Movement and the Law (1989); serving on countless committees (including University Student Race Relations Committee and University Minority Recruitment Committee).

Professor Bush is also an ardent champion of individual rights, open democratic process, and faculty self-governance. At the time of his retirement, he was serving both as President of the Mississippi branch of the American Civil Liberties Union and as Chair of the Faculty Senate. He retired after twenty years of dedicated service to the University of Mississippi School of Law to accept a full-time position at Cornell Law School as the Jack G. Clarke Executive Director of International and Comparative Programs.

The Mississippi Law Journal dedicates this issue to Professor Bush in grateful appreciation for all he has done for legal education.

⁶ Technically he received the LL.B. in 1979, but it was converted to an LL.M. in 1995.

⁷ He is counsel of record in ten published decisions in the Lexis database.

⁸ For early roots of his gourmet taste, see *supra* note 4.

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WHAT COURTS CAN DO IN THE FACE OF THE NEVER-ENDING ASBESTOS CRISIS

*Paul F. Rothstein**

For more than twenty-five years, state and federal courts across the country have struggled to respond to an ever-expanding asbestos litigation crisis.¹ Over \$20 billion and thirty bankruptcies later, more asbestos claims are filed now than ever before.² Many predict that the number of claims (and the number of bankruptcies) will only keep increasing and that tens of billions of additional dollars will be spent.³

* Professor of Law, Georgetown University Law Center. Professor Rothstein is author of *Evidence: Cases, Materials and Problems*, *Evidence in a Nutshell: State and Federal Rules of Evidence* and several other books as well as over 100 articles. The preparation of this article was made possible by funding from the Coalition for Asbestos Justice, Inc.

¹ One of the first major asbestos-liability cases was *Borel v. Fibreboard Corp.*, 493 F.2d 1076 (5th Cir. 1973), where the court of appeals affirmed a verdict against an asbestos defendant on a strict liability theory.

² See Harold Brubaker, *Three Major Firms Have Filed for Bankruptcy Protection from Asbestos Claims*, PHILA. INQUIRER, Jan. 13, 2001 (describing the history of Crown Cork & Seal which, for three months in the early 1960s, owned a company that made one product that allegedly contained asbestos and still spent \$90 million on asbestos claims in 2000 alone); John Rooney, *Evolution, Not End, Seen for Asbestos Litigation*, CHIL. DAILY L. BULL., Apr. 21, 2001; *A Trail of Toxic Torts: Fresh Asbestos Trouble for Insurers*, THE ECONOMIST, Jan. 27, 2001, available at 2001 WL 7317425.

³ See *The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *Hearings*] (statement of Christopher Edley, Jr., Professor, Harvard Law School); Christopher Bowe, *The Americas: Asbestos Sparks New Jitters in US Litigation*, FIN. TIMES, Jan. 31, 2001; Queena Sook Kim, *Asbestos Claims Continue to Mount*, WALL ST. J., Feb. 7, 2001, at B1, available at 2001 WL-WSJ 2853509; Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., March 5, 2001, at A-1, available at 2001 WL-WSJ 2856111. A.M. Best Co. recently estimated that asbestos claims could ultimately cost the insurance industry \$65 billion. Lorraine Gorski, *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, BESTWIRE, May 8, 2001. Additional billions of dollars would be incurred by defendants themselves. A recent study by

Despite the lengthy history of asbestos litigation, our courts have not been able to develop a coordinated, comprehensive and fair method to resolve the asbestos problem. Judges, in an effort to clear their dockets, have often adopted case management techniques that have actually encouraged more and more asbestos claims, particularly by claimants who are, at best, mildly impaired or more recently, not sick at all.⁴ As a result, plaintiffs with no physical impairment receive windfall settlements that reduce the amount of funds available to pay the claims of those who are truly sick or who may become truly sick. At the same time, many of these case management techniques have limited the procedural protections typically available to tort defendants.

Without a fair and rational method of resolving asbestos claims in the tort system, and with federal legislation remaining highly speculative, defendants have increasingly been forced into bankruptcy courts.⁵ That outcome benefits no one. Plaintiffs suffer because the limited pool of funds available to pay asbestos claims is "steadily being depleted,"⁶ making it more likely that claimants who develop a serious asbestos-related illness will not receive adequate or timely compensation in the future.⁷ Bankrupt companies may have to lay off employees, close plants and cut back on core business practices—matters which can be significant to the

Tillinghast-Towers Perrin estimates that the ultimate cost will reach \$200 billion, of which 39% will be borne by defendants and 61% by U.S. or foreign insurers. *Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost \$200 Billion*, BUS. WIRE, June 12, 2001 [hereinafter *Tillinghast-Towers*].

⁴ *The Asbestos Blob*, WALL ST. J., July 2, 2001, at A-14, available at 2001 WL-WSJ 2868353.

⁵ Since the beginning of 2000, seven major asbestos defendants, including U.S. Gypsum in June 2001, have filed for bankruptcy. See Daniel Gross, *Recovery Lessons from an Industrial Phoenix*, N.Y. TIMES, Apr. 29, 2001, at B4; Sabrina Jones, *It's Been 38 Years Since W.R. . . .*, WASH. POST, Mar. 19, 2001, at E-1 (discussing the claims against W.R. Grace which filed for bankruptcy shortly after the article was published), available at 2001 WL 2552120.

⁶ *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000).

⁷ See Queena Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, WALL ST. J., Dec. 21, 2000, at B4, available at 2000 WL-WSJ 26620724; Mark D. Plevin et al., *Don't Bankrupt Asbestos*, LEGAL TIMES, Mar. 19, 2001, at 68.

local or national economy.⁸ And, in consequence, some other good, safe, even beneficial, non-asbestos products may no longer become available, either because of the financial problems of the company or because the company or other companies, perhaps unreasonably, fear liability. Bankruptcies are also bad news for remaining defendants that have only a remote connection to asbestos such as oil companies, hospitals, colleges and many local "mom and pop" small businesses.⁹ Plaintiffs seek compensation from these peripheral defendants to make up for the loss of funds from larger, more culpable companies that have gone into bankruptcy.¹⁰ This has a domino effect that results in additional defendants filing for bankruptcy.¹¹

⁸ Financial problems are of course faced by companies that have not filed for bankruptcy protection. "Every company that is a defendant in asbestos litigation" sees these lawsuits "sop up cash flow, diverting money that could be used to develop new products, hire new employees, and build new plants." Brubaker, *supra* note 2. The stock values of these companies plummet because "Wall Street loathes the uncertainty of a liability that seems to have no end." *Id.*; see also *The People v. America Inc.: American Companies in Court*, THE ECONOMIST, Mar. 24, 2001 (discussing the financial scrutiny being faced by companies with even the most remote connection to asbestos claims), available at 2001 WL 7318244.

⁹ Deepa Babington, *Lawyers Seek New Asbestos Targets After W.R. Grace*, REUTERS, Apr. 2, 2001; Cy Goldberg & Darren Check, *Bullseye Gets Bigger on Peripheral Defendants: The Effect of Bankruptcies on Asbestos Litigation*, LEGAL INTELLIGENCER, Apr. 25, 2001; Adrian Michaels, *Problem of Cash Reserves to Meet Rising Claims*, FIN. TIMES, Apr. 27, 2001, at 3.

¹⁰ U.S. Gypsum filed for bankruptcy in June 2001 citing political changes in the U.S. Senate which it believed made asbestos legislation less likely. *USG Says It May Seek Bankruptcy Protection*, WALL ST. J., June 5, 2001, at A-12, available at 2001 WL-WSJ 2865545. U.S. Gypsum had been lobbying Congress for a legislative solution but pointed to slower progress than expected combined with increasing settlement demands that are "completely out of proportion to our . . . liability." *Id.* Crown, Cork and Seal spent \$100 million on asbestos litigation in 1999 and \$160 million in 2000 and had estimated that its 2001 costs would be \$275 million. MEALEY'S LITIG. REP.: ASBESTOS, May 18, 2001, at 13.

¹¹ Bankruptcies have caused some plaintiffs' lawyers to file new claims at a "dizzying pace." Bill Geroux, *Asbestos Lawsuits Multiply: Bankruptcies Chief Reason*, RICH. TIMES-DISPATCH, Apr. 28, 2001, at B-2, available at 2001 WL 5321831. As one publication that tracks asbestos litigation noted, "The cumulative effect of bankruptcy reorganization by many large asbestos defendants has left many of the remaining companies reeling as new claims remain on the rise with no end in sight." MEALEY'S LITIG. REP.: ASBESTOS, May 18, 2001, at 13 That article reported the claim data for the following non-bankrupt defendants. (1)

The purpose of this article is not to argue that claimants suffering from serious asbestos-related diseases should not be compensated. To the contrary, one of the points of this article is that absent some change in the way asbestos claims are resolved,¹² claimants who become truly sick in the future may not receive adequate compensation. Changing the current asbestos compensation system would be pro-claimant.

Also, the purpose of this article is not to ascribe blame. Rather, it is to fix a problem. The judges cannot be blamed for their good intentions. Neither can the plaintiffs' attorneys be blamed for zealously representing their clients—which is what they are doing here.¹³ This normally produces great social good. However, in the case of asbestos, a seriously flawed system has resulted.

I. THE CURRENT ASBESTOS CRISIS

No one could have predicted that more than twenty-five years after asbestos product liability litigation emerged, courts would still be facing tens of thousands of new claims each year. Certainly no one would have predicted that by the year 2000, over 200,000 asbestos cases would be clogging the courts with new claims increasing at a staggering rate. In fact, new claims against the largest asbestos defendants have averaged approximately 40,000 per year over the past several years.¹⁴

Two examples are noteworthy. In the year 2000 alone, 60,000 claims were filed against the Manville Trust—a Trust established to handle asbestos claims against Johns-Manville Corp., which filed for bankruptcy in 1982. The year 2000 ava-

Owens-Illinois – 20,000 new claims in 2000 (compared to 12,000 new claims in 1999), (2) Federal Mogul – 39,000 new claims in 2000, (3) Pfizer – 33,165 pending claims against itself and 58,346 pending claims against its Quigley subsidiary in 2000 (compared to 26,890 pending claims against Pfizer in 1999 and 57,328 pending claims against Quigley in 1999). *Id.*

¹² For a discussion concerning recent efforts to pass asbestos legislation, see James Reed, *Federal Asbestos Legislation: The Search for a Strategy*, HARRIS MARTIN COLUMNS: ASBESTOS, Apr. 2001.

¹³ They also get paid but so do the lawyers and businessmen on the other side. A system that pays people to look out for the interests of others is not a bad system.

¹⁴ See *Hearings*, *supra* note 3.

lanche represented the greatest number of claims filed against Manville since 1989, the Trust's first full year of operation.¹⁵ The Trust also estimates that there will be 50% more claims in 2001 than the previous high-water mark set a year earlier.¹⁶ Because of the flood of new claims, the Trust imposed a sixty-day moratorium to determine if it could continue to pay claims as it has in the past.¹⁷

Similarly, in a recent filing in the United States Bankruptcy Court for the District of Delaware, W.R. Grace & Co. stated that in 2000 asbestos claims had increased 81% over the prior year, reaching a total of 49,000 claims.¹⁸ Moreover, in January of 2001, claims against W.R. Grace had increased 374% over those in January of 2000, and February of 2001 claims were 207% higher than February of 2000.¹⁹

Defendants have settled well over 300,000 claims, but these efforts to resolve the claims have failed to reduce the caseload. One defendant, Owens Corning, devised a National Settlement Program to settle as many claims as possible. That Settlement Program was cited by opponents of legislative reform as an example of why asbestos legislation was not necessary.²⁰ But even after settling hundreds of thousands of claims, Owens Corning was forced to file for bankruptcy because claimants continued to bring more and more claims seeking larger and larger settlements.²¹

¹⁵ See Letter from David Austern, President, Claims Resolution Management Corporation, to Attorneys Who File Manville Trust Claims (Mar. 26, 2001) (on file with author).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ W.R. Grace & Co.'s Informational Brief at 38, *In re* W.R. Grace & Co. (Bankr. D. Del. Apr. 2, 2001) (No. 01-01139).

¹⁹ *Id.* at 38-39. As a historical marker, prior to 1980, there were approximately 950 cases pending in the federal courts. See TERRENCE DUNGWORTH, *PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURTS* 36 (1988). By 1985, that number increased four-fold to over 37,000 cases. *Id.*; see also DEBORAH R. HENSLER, *ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW* 3 (1992).

²⁰ See H.R. REP. NO. 106-782, at 67 (2000) (describing the Justice Department's views on behalf of the Clinton Administration).

²¹ *Owens Corning Files Voluntary Chapter 11 Petition to Resolve Asbestos Liability*, PR NEWSWIRE, Oct. 5, 2000; Joseph B. White & Jim Vandehel, *Owens*

While the initial focus of asbestos litigation was the asbestos producers and the manufacturers of asbestos products, over time the pool of defendants has grown. More than 2000 companies or individuals have been named as asbestos defendants in courts across the country, and the number of defendants is growing.²² As the primary asbestos defendants have declared bankruptcy, the list of defendants has been expanded to include companies with little more than a remote connection to asbestos.²³ The new defendants are diverse, ranging from oil companies, to automobile manufacturers, to hospitals and colleges. They generally have an attenuated connection to asbestos.²⁴ Some of these peripheral defendants have already sought bankruptcy protection.²⁵

Perhaps these developments in asbestos litigation—a substantial increase in both the number of claims and the number of peripheral defendants—would be understandable if the number of sick claimants were also increasing. But that is not the case. The bulk of the new cases are being filed by people who are not sick in a meaningful sense. As many as 80% of new cases are brought by plaintiffs who suffer from no physical impairment,²⁶ and it is likely that most of these

Corning Files for Chapter 11, Citing Escalating Asbestos-Liability Claims, WALL ST. J., Oct. 6, 2000, at A3, available at 2000 WL-WSJ 22612276.

²² See *Innocent Hurt in Asbestos Suits*, CHI. SUN-TIMES, July 3, 2001, at 21, available at 2001 WL 7240088; Douglas McLeod, *Asbestos Continues to Bite Industry*, BUS. INS., Jan. 8, 2001, at 1, available at 2001 WL 5100719.

²³ See *supra* notes 9-11 and accompanying text.

²⁴ Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1, available at 2000 WL-WSJ 3025073; see also Brubaker, *supra* note 2 (discussing order requiring Sears to pay \$1.5 million to a seventy-eight-year-old man who purchased building materials containing asbestos from Sears fifty years ago).

²⁵ See, e.g., *Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike in Claims*, MEALEY'S LITIG. REP.: ASBESTOS, Jan. 5, 2001, at 1.

²⁶ See Queena Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12 (citing report from G-I Holdings, formerly GAF Corp., that "as many as 80% of its asbestos settlements are paid to unimpaired people"), available at 2001 WL-WSJ 2850312; see also Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1853 (1992) (stating that in 1992, claims by the unimpaired "account[ed] for sixty to seventy percent of new asbestos claims filed."). Allegations typically assert that plaintiffs may have future harm or

plaintiffs will never become ill from their exposure to asbestos.²⁷ If they had little or no costs, particularly to those who are or will become more compellingly ill, suits by such claimants might be considered just. Yet the lawsuits by these relatively unimpaired claimants are allowed to proceed and reduce the limited pool of resources available for those individuals who are much sicker or dying or will become sick with serious asbestos-related diseases in the future.

That funds may not be available for these latter individuals has been apparent since the early 1990s. In 1990, Chief Justice Rehnquist convened a Judicial Conference Committee to examine the growing asbestos litigation problem.²⁸ After extensive study, the Committee reported in 1991 that the "situation has reached critical dimensions and is getting worse."²⁹ Characterizing the state of asbestos litigation as "a disaster of major proportions to both the victims and the producers of asbestos products," the Committee concluded that the courts were "ill-equipped" to address the mass of claims in an effective manner.³⁰ The increasing caseload made long pre-trial delays increasingly "routine," while the continuing exhaustion of defendants' assets has raised a real prospect that "future claimants may lose altogether."³¹

Recent awards to unimpaired or mildly impaired claim-

have only pleural plaques. "[Pleural] plaques are areas of (the pleura membrane covering the lung and chest wall) in which cell tissue is replaced by tougher tissue. Pleural plaques result from asbestos exposure 'but do not affect lung functions and do not necessarily lead to asbestosis or increase the risk of cancer'" *Hearings, supra* note 3 (statement of William N Eskridge, Jr., Professor, Yale Law School).

²⁷ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 746-47, 750-51, 812 (E.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on reh'g*, 993 F.2d 7 (2d Cir. 1993) (discussing the mass, assembly-line medical screening programs employed by some attorneys for claimants); see also *Tillinghast-Towers, supra* note 3 (indicating a significant majority of new claims are for non-malignant diseases).

²⁸ Judicial Conference Ad Hoc Comm. on Asbestos Litig., *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States*, MEALEY'S LITIG. REP.: ASBESTOS, Mar. 15, 1991, at 3.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.* at 3; see *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 746-47, 750-51, 812 (describing the backlog of asbestos personal injury cases).

ants illustrate the Committee's concern that truly sick claimants may face a depleted pool of assets in the future. In October of 2001, a Mississippi jury awarded six asbestos plaintiffs \$150 million—\$25 million each—even though none of the plaintiffs are sick from asbestos and may never become so.³² The plaintiffs claimed that in the future they may suffer asbestos-related diseases because their work, often decades ago, brought them into contact with asbestos-containing products. In March of 2001 a Texas jury awarded twenty-two plaintiffs, who were not seriously ill, \$35 million for "future physical impairment" and "future medical costs although it is likely that these claimants will never become seriously ill."³³ There are many similar examples. In February of 1998, a Texas jury awarded \$115.6 million in damages³⁴ to twenty-one plaintiffs whose illnesses ranged from "mild" to "asymptomatic" asbestosis, and even to "unconfirmed" illnesses.³⁵ Also in 1998, a Mississippi state jury awarded between \$2 million and \$3.5 million to two plaintiffs whose alleged asbestosis could not be detected by x-ray examinations.³⁶

How did we get here? Unfortunately, the courts themselves must share some of the responsibility. Many courts have adopted substantive or procedural mechanisms designed to streamline court dockets and move these cases through the system, without regard to the merits of the claims. While these judges undoubtedly had good intentions, they have actually made things worse by encouraging the filing and settlement of questionable claims.³⁷ As one commentator noted

³² See Margaret Cronin Fisk, *Jury Awards Six Asbestos Plaintiffs \$25M Each*, NAT'L L.J., Nov. 12, 2001, at B1; Patti Waldmeir, *The Need for Damage Limitation*, FIN. TIMES (FT.com), Nov. 15, 2001, available at 2001 WL 28473877.

³³ *Two Asbestos Defendants Hit with \$35 Million Verdict*, 23 No. 4, ANDREWS ASBESTOS LITIG. REP., Mar. 1, 2001, at 3.

³⁴ This \$115.6 million included \$15.6 million in compensatory damages and \$100 million in punitive damages. McLeod, *supra* note 22.

³⁵ *Id.*

³⁶ *Hearings*, *supra* note 3. See generally Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

³⁷ For example, the court administrator in Cuyahoga County, Ohio, noted that "We are victims of our own success." *Cuyahoga Asbestos Cases Abound*, DAYTON

nearly four years ago,

Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.³⁸

In the federal courts, all asbestos claims have been consolidated for pre-trial purposes before Senior United States District Judge Charles R. Weiner of the Eastern District of Pennsylvania (the federal MDL Panel). Thus, the same procedural rules implemented by the court, such as the severing of all punitive damages claims,³⁹ have been used in connection with tens of thousands of claims. But state courts have adopted different and, often, contradictory rules. For example, some courts place suits brought by unimpaired claimants on an inactive docket so that the seriously ill can be compensated first. Other courts however, such as courts in Mississippi,⁴⁰ consolidate thousands of claims of relatively unimpaired people with the claims of those who are quite sick or dying. This practice tends to overcompensate the relatively unimpaired at the expense of the very sick. This lack of coordination can best be demonstrated with some concrete examples.

DAILY NEWS, May 14, 2001, at 2-B, available at 2001 WL 21258316. That court's cases have grown from 4000 to 27,000 in just four years and the court "has become so experienced at handling asbestos cases that even people who never lived or worked in Ohio file their lawsuits in the court." *Id.*

³⁸ Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

³⁹ *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied sub nom., Collins v. Mac-Millan Bloedel, Inc., 121 S. Ct. 2216 (2001).

⁴⁰ See, e.g., John Porretto, *Rural County Known for Huge Verdicts*, BILOXI SUN HERALD, July 2, 2001 (discussing the negative impact on jobs, the cost of healthcare and availability of insurance); see also *supra* note 36.

II. THE LACK OF COORDINATION AMONG THE COURTS

Early rulings in favor of asbestos claimants often resulted from the willingness of courts to stretch accepted legal principles or develop new theories that permitted claims where traditional theories would have denied recovery. While clearly the result of good intentions—compensating people harmed by asbestos—such rulings only tended to encourage unmeritorious lawsuits. Faced with the addition of thousands of asbestos cases to their dockets, courts began to use a wide variety of substantive and procedural methods to try to manage the ever-increasing caseload. Some of these mechanisms sought to take into account the problems posed by asbestos litigation such as limited resources and suits by unimpaired claimants. But most of the procedures adopted by the courts were designed to move cases along as if efficiency and expediency were the only important factors; they ignored the prospect that claimants who actually become seriously ill in the future may not be adequately compensated, ignored important rights of defendants and ignored the impact of increasing numbers of defendant bankruptcies.

The different ways that courts have addressed the asbestos problem, can be seen by (1) the response by courts to the filings by unimpaired claimants, (2) the use by courts of mass joinders or mass trials in certain states, (3) the willingness of courts to permit the award of medical monitoring costs and (4) the failure of courts to account for the impact of punitive damages, including their *in terrorem* effect at the settlement table.

A. Addressing the Dilemma of the Unimpaired Claimant

At the heart of the current asbestos problem are claims brought by individuals who are not seriously ill or who may never become sick at all. As noted above, a large number of cases filed against asbestos defendants are filed by plaintiffs with no serious physical impairments. When these weak cases are consolidated with other cases, or when courts force settlements of these weak cases by allowing the claims of the truly sick to be leveraged, the plaintiffs who are not ill use the plain-

tiffs who are seriously ill to "inflate the value of those claims."⁴¹ Plaintiffs who are not seriously ill and suffer no physical impairment receive recoveries to the detriment of those plaintiffs who are seriously ill and dying.

Only a relatively small portion of the current nationwide burden of asbestos lawsuits involves serious injuries.⁴² Only a small fraction of the cases present claims of severe asbestosis or asbestos-related malignancies such as lung cancer or mesothelioma. Far greater numbers involve conditions which, if present at all, are associated with little or no actual impairment.⁴³ This has led Judge Weiner, who oversees the federal asbestos multidistrict proceedings, to note that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases."⁴⁴ The influx of large numbers of claims by the relatively unimpaired defeats the purpose of the tort system: "that the sick and dying, their widows and survivors should have their claims addressed first."⁴⁵ Claimants' attorneys understandably fear, however,

⁴¹ *Hearings*, *supra* note 3; see also Patricia Waldmeir, *A Legal System Insulated from Logic: A New Surge of Asbestos Lawsuits is Bankrupting U.S. Business and Exposing the Failings of the Law*, FIN. TIMES, June 7, 2001, at 12.

⁴² As Judge Weinstein has pointed out, large numbers of claims by plaintiffs without serious injury are often generated as a result of mass, "assembly-line" medical screening programs:

[Some attorneys] have filed all of their cases without regard to the extent of injury. In conjunction with unions they have arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque.

In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 748 (E.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on reh'g*, 993 F.2d 7 (2d Cir. 1993).

⁴³ See *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring.")

⁴⁴ *In re Asbestos Prods. Liab. Litig.* (No. VI), 1996 WL 539589, at *1 (E.D. Pa. Sept. 12, 1996).

⁴⁵ *In re Patenaude*, 210 F.3d 135, 139 (3d Cir. 1999), *cert. denied*, 531 U.S. 1011 (2000). See generally Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001); Peter H. Schuck, *The Worst Should Go First*

that if they don't file claims for their relatively unimpaired clients, the statute of limitations may have run if and when the clients do become seriously ill. It is a valid concern and drives some of the problem.

To date, only a handful of courts, such as the Supreme Court of Pennsylvania, have been willing to take steps to address this problem. That court has ruled that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action.⁴⁶ Further, the court held that the discovery of pleural plaques or a non-malignant, asbestos-related lung pathology "does not trigger the statute of limitations with respect to an action for later, separately diagnosed disease of lung cancer."⁴⁷ The court added "because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable."⁴⁸

The Pennsylvania Supreme Court's decision is an important step in the right direction. First, the court's ruling ensures that those who are not seriously ill will not threaten the right to compensation of those who are.⁴⁹ Second, the court affirmed that individuals need not file claims simply to avoid any statute of limitations issues; absent physical impairment the clock does not run.⁵⁰

Cognizant of both the statute of limitations issue and the problems posed by unimpaired claimants, a few other courts have created pleural registries or inactive dockets pursuant to which the claims of those who cannot meet certain objective medical criteria are placed on an inactive docket where statute of limitations and similar defenses are tolled. For example, the Massachusetts inactive asbestos docket was created in Septem-

Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

⁴⁶ See *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (upholding *Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. 1993)).

⁴⁷ *Simmons*, 674 A.2d at 237.

⁴⁸ *Id.* at 238.

⁴⁹ See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts, Report on Mass Tort Litigation 2 (Feb. 15, 1999) (comments of John Aldock, Esq., participant in Dec. 8, 1998, Mass Torts Working Group Conference).

⁵⁰ *Id.*

ber of 1986 through an amendment to an order creating a statewide consolidated asbestos docket.⁵¹ The docket provides a mechanism by which plaintiffs who have been diagnosed with asbestos-related pleural diseases can toll all applicable statutes of limitations regarding their claims or the related claims of their families or estates, until their pleural conditions developed into either asbestosis or some type of malignancy.⁵² While on the inactive docket, cases are exempt from discovery.⁵³

Similarly, the Circuit Court for Cook County, Illinois, created a pleural registry system in March of 1991.⁵⁴ In creating that system, the court recognized that asbestos litigation posed problems for parties: plaintiffs exhibiting no impairment filed claims out of fear that the statute of limitations would expire before their disease progressed to a stage that was medically recognized as impaired, while defendants expended substantial sums in appearing in and defending against such inchoate claims.⁵⁵

Under the Cook County plan, claimants must file an Asbestos Personal Injury Information Sheet.⁵⁶ Cases in which an asbestos-related cancer or mesothelioma is alleged may immediately go on the active docket.⁵⁷ Claimants who have a history of asbestos exposure and demonstrate objective asbestos-

⁵¹ See Commonwealth of Mass., Middlesex Super. Ct., MASSACHUSETTS STATE COURT ASBESTOS PERSONAL INJURY LITIG. ORDER, Sept. 1986.

⁵² *Id.*

⁵³ *Id.* Similarly, pleural cases originally filed in the consolidated docket may be transferred to the inactive docket on plaintiffs motion, and thereafter become subject to all of the same provisions and requirements as cases originally filed on the inactive docket. *Id.*

⁵⁴ See Order to Establish Registry for Certain Asbestos Matters, *In re Asbestos Cases* (Cir. Ct., Cook County, Ill. Mar. 26, 1991) [hereinafter Registry Order]. The pleural registry in Cook County was created by Judge Dean Trafaleo who handled the asbestos cases for a fourteen-year period that ended in 1998. When Judge Trafaleo took over the asbestos cases there were 8000 cases pending, but today there are about 875 pending cases with another 1200 cases on the pleural registry. See Rooney, *supra* note 2.

⁵⁵ Registry Order, *supra* note 54.

⁵⁶ *Id.* All claims must be filed individually, as the Order prohibits claims on behalf of groups or classes of claimants. *Id.*

⁵⁷ *Id.*

related physical findings (such as pleural plaques) but who either do not meet the minimum criteria for impairment, as defined in the Order, or who have not manifested a cancer certified as asbestos-related, as defined in the Order, place their claims on the registry.⁵⁸ While on the registry, claims are exempt from discovery and "shall not 'age' for any purpose."⁵⁹

Other courts have also begun to acknowledge the unimpaired claimant problem. Recently, the Texas Supreme Court addressed a statute of limitations question arising out of an asbestos claim and, in that context, noted the problems raised by compensating unimpaired claimants. In *Pustejovsky v. Rapid American Corp.*,⁶⁰ the issue before the court was whether a plaintiff could bring separate actions for separate latent asbestos diseases.⁶¹ The court found that a claim for malignant asbestos disease would not be barred by the statute of limitations even where a previous claim for asbestos exposure or minimal impairment had been filed. The court concluded that it was better to allow the second action because otherwise, claimants would feel compelled to bring premature and vague claims (such as fear of cancer) to avoid statute of limitations issues. The court specifically identified its concern that giving damages to claimants who are not sick in a meaningful sense would result in the overcompensation of those who do not get a disease and a "systematic under-compensation" for those who do.⁶²

B. Mass Joinders and Mass Trials

Perhaps the most troubling procedural mechanism used by courts to resolve large numbers of asbestos claims has been the mass joinder or mass trial of thousands of individual claims

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 35 S.W.3d 643 (Tex. 2000).

⁶¹ The court noted that it had previously held that a claimant who had been exposed to asbestos but had not developed a serious asbestos-related disease could not bring a claim for fear of developing such disease. *Pustejovsky*, 35 S.W.3d at 648-50.

⁶² *Id.* at 650.

which include claims by both those who are demonstrably sick and those who are unimpaired. The use of this procedural conglomeration threatens both the right of the seriously ill plaintiffs to be fully compensated and the right of defendants to fair process.

1. Mississippi

Although Mississippi does not have court procedures that allow for class actions, Mississippi joinder rules do allow for the joinder of hundreds or thousands of claimants from across the country in one case. Under Mississippi rules, it does not matter how many plaintiffs are from out-of-state so long as one of the plaintiffs is a Mississippi resident who is suing one out-of-state defendant.⁶³ This "one and all" rule is procedurally similar to class actions but without the same level of protection.⁶⁴ Mass joinder of asbestos claims in Mississippi courts, in conjunction with Mississippi rules that provide limited time for discovery, can be used to limit the procedural protections to which defendants are generally entitled.⁶⁵

A Mississippi case that highlights the problem is *Cosey v. E.D. Bullard Co.*,⁶⁶ a consolidated case where a trial involving twelve of the 1738 plaintiffs resulted in a jury verdict of \$48.5 million.⁶⁷ The judge advised the defendants to settle with the

⁶³ See Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 27, 2001 (describing Mississippi as "mecca for plaintiff's lawyers"); Stephen Labatron, *Top Asbestos Makers Agree to Settle 2 Large Lawsuits*, N.Y. TIMES, Jan. 23, 2000, at 22.

⁶⁴ See, e.g., MISS. UNIF. R. OF CIR. & COUNTY CT. PRAC. § 4.04A (requiring that discovery be completed within ninety days of filing of answer).

⁶⁵ According to one former Chief Justice of the Mississippi Supreme Court, the joinder rules were never intended to authorize the type of "quasi-class litigation" that takes place. Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 1-A. If this multi-claimant litigation had been intended, a class action rule would have been proposed, according to another former Mississippi Supreme Court Chief Justice, who added that "[w]e did not favor class-action suits for reasons that it was burdensome, and our courts weren't equipped to handle them." *Id.* Other procedural mechanisms in Mississippi attract asbestos claimants. Labatron, *supra* note 63. For example, in Mississippi defendants have no right to perform medical exams. See *id.*

⁶⁶ Civ. No. 95-0069 (Cir. Ct., Jefferson County, Miss. 1995).

⁶⁷ Motion for Disqualification and Recusal of Judge at 5, *Cosey*, Civ. No. 95-

remaining plaintiffs, or he would try them immediately in front of the same jury, with an instruction to find the defendants liable.⁶⁸ When counsel for the defendants said the plan sounded "like this side of hell," the judge corrected him saying, "No counsel, this is hell."⁶⁹ As one defendant's general counsel remarked, "It's no secret that there are state courtrooms in Mississippi which have become notorious for awarding outlandish verdicts to asbestos claimants who are not sick and as a result, asbestos cases from all over the country tend to migrate there."⁷⁰

Not surprisingly, Mississippi's rules have resulted in forum-shopping.⁷¹ Over the past few years the number of plaintiffs filing suit in Jefferson County has exceeded the number of Jefferson County residents.⁷² In early 2001, two new asbestos suits were filed in Mississippi, one including over 2000 claimants⁷³ and a second involving over 7000 claimants,⁷⁴ a majority of whom did not reside in Mississippi. Unfortunately, it appears this trend will continue. The Mississippi Supreme Court recently rejected a request to correct the problem in *American Bankers Insurance Co. v. Alexander*.⁷⁵ There the court affirmed the joinder of 1371 plaintiffs in a case in Jefferson County, and made no attempt to change Mississippi's joinder rules.⁷⁶

0069 [hereinafter Motion to Recuse]. Punitive damages were to be decided in a separate phase of the trial. *Id.*

⁶⁸ *Id.* at 5-6; see also *Hearings*, *supra* note 3 (noting that the plaintiffs in Cosey, whose disease could not be detected by x-ray, were awarded between \$2 million and \$3.5 million each).

⁶⁹ Motion to Recuse, *supra* note 67, at 6.

⁷⁰ Labatron, *supra* note 63 (quoting Richard A. Weinberg, General Counsel for GAF Corp.).

⁷¹ See *The Cloud Grows Darker over Our Judiciary System*, THE TIMES (Lamar County, Miss.), June 28, 2001 (describing efforts to sign up plaintiffs to bring suit in certain Mississippi counties).

⁷² Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 1-A. Since 1999, the number of plaintiffs that have filed suit in Jefferson County, Mississippi (more than 10,000), has outnumbered the total number of people in the county (9740). *Id.*

⁷³ Third Amended Complaint 1, Ex. A at 1-31, Bankston v. Westinghouse Elec. Corp., No. 2000-17-CVI (Cir. Ct., Jones County, Miss. Mar. 20, 2001).

⁷⁴ Amended Complaint 1, Ex. A at 1-146, Williams v. A.P. Green Indus., Inc., No. 2001-6-CV3 (Cir. Ct., Jones County, Miss. May 29, 2001).

⁷⁵ No. 98-IA-0046-SCT, 2001 WL 83952 (Miss. Feb. 1, 2001).

⁷⁶ *Am. Bankers Ins. Co.*, 2001 WL 83952, at *1. Nevertheless, one current Su-

2. West Virginia

The West Virginia courts have used mass trials for tens of thousands of asbestos claims. Beginning with the first consolidated trial in 1989, over 20,000 asbestos claims have been included in mass trial groups.⁷⁷ These trials did not address all liability issues. Instead, there were no named plaintiffs presented to the jury, and the issue to be resolved was whether any of the numerous defendants had either manufactured a defective product or maintained a workplace which was not reasonably safe. The mass trials also determined whether some of the defendants had acted in a manner that would warrant an award of punitive damages and asked the jury to develop a "multiplier" for calculating such damages.⁷⁸ A second phase was contemplated which would only then focus on the defendant's liability and the amount of the compensatory damages.⁷⁹ Although the ostensible purpose of this procedure was to avoid repetitive litigation, the goal was to "provide the opportunity for the parties to settle massive numbers of cases at one sitting."⁸⁰

In 1996, the West Virginia Supreme Court had the opportunity to address the viability of these mass trials in a situation where there were no common issues among the defendants who each allegedly had maintained an unreasonably safe workplace.⁸¹ The plaintiffs had allegedly worked in various facilities owned by different defendants all of which were in West Virginia.⁸² These "premises"-related defendants chal-

preme Court Justice has expressed support for a rule addressing who can access Mississippi courtrooms. See Toni Terrett, *Supreme Court Justice Books Tort Reform*, CLARION-LEDGER (Jackson, Miss.), June 18, 2001.

⁷⁷ See Preliminary Reply of the Respondent, A Andrew MacQueen, with Objections and Motions at 5, *Mobile Oil Corp. v. MacQueen*, No. 29768 (W. Va. May 25, 2001) [hereinafter Preliminary Reply of Judge MacQueen].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *West Virginia ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996).

⁸² *MacQueen*, 479 S.E.2d at 302.

lenged the trial court's consolidation of a number of separate civil actions filed on behalf of individuals who claimed physical injuries stemming from asbestos exposure which occurred while the plaintiffs were "constructing, repairing, and/or maintaining various facilities" owned by the defendants.⁸³ The Supreme Court of West Virginia ruled that the consolidation plan was appropriate and provided the trial court with "broad authority" for resolving as many claims as quickly as possible.⁸⁴

Until recently, however, it appeared that some change might be forthcoming. The West Virginia Supreme Court elected to consolidate virtually all West Virginia asbestos claims before one judge under West Virginia's mass litigation procedures. As part of the Mass Litigation Panel proceedings, the judge in charge held a series of meetings with counsel for plaintiffs and defendants to formulate a plan for proceeding with the asbestos cases.⁸⁵ Plaintiffs sought to continue the trial practices that made West Virginia an attractive jurisdiction. Plaintiffs requested "a consolidated, common issues trial for all pending asbestos cases,"⁸⁶ arguing that past consolidations "created important, substantive rights" and therefore, a denial of those procedures in the future "raise[d] issues of a denial of substantive due process and equal protection to the . . . members of the . . . class under both the Constitution of West Virginia and the United States Constitution."⁸⁷ The motion was denied, and the court instead scheduled "a series of small-group, all-issues trials"⁸⁸ (although Judge MacQueen argued that an inactive docket may violate the West Virginia

⁸³ *Id.*

⁸⁴ *Id.* at 305.

⁸⁵ Petition for Writ of Mandamus, Writ Granted as Moulded at 5, West Virginia *ex rel.* Ronald Allman v. MacQueen, No. 29767 (W. Va. July 6, 2001) [hereinafter W. Va. Mandamus Ruling].

⁸⁶ Plaintiffs Represented by the Law Offices of Stuart Calwell, PLLC; Peyton, Parenti & Whittington; the Law Office of John E. Sutter; Hartley & O'Brien Law Offices; James F. Humphrey & Associates, L.C.; and Harvit & Schwartz, L.C.'s Memorandum in Support of Plaintiffs' Earlier Motion for Mass Trial at 1, *In re Asbestos Personal Injury Litigation*, No. 00-Misc-222 (Cir. Ct. of Kanawha County, W. Va. Mar. 16, 2001) [hereinafter Plaintiffs' Motion for Mass Trial].

⁸⁷ *Id.* at 2.

⁸⁸ W. Va. Mandamus Ruling, *supra* note 85, at 5.

Constitution).⁸⁹

Unfortunately, the West Virginia Supreme Court reversed course and, while allowing at least some of the small-group, all-issues trials to proceed, made clear that it expected to see larger consolidated trials. The court appointed a new "supervising judge" to schedule a new series of meetings with counsel for plaintiffs and defendants to consider the types of larger trial groups that should be scheduled.⁹⁰ The court said that those trial groups might include, among other things, "cases involving the premises liability theory," "cases with issues susceptible to mass trial of all or most parties" and "cases involving common product exposure."⁹¹ Thus, mass trials will probably be back in West Virginia in the future.

3. Maryland

Trial courts in Baltimore, Maryland, have also consolidated thousands of asbestos claims. The first mass trial, held in 1992, was broken into phases and, as in West Virginia, focused on general issues of liability and punitive damages. Following the mass trial, the court scheduled a series of smaller trial groups or mini-trials to resolve the remaining issues specific to individual claimant issues. Rather than resolving claims quickly and efficiently, ten years later these mini-trials have yet to be concluded.⁹² In February of this year, a judge in Baltimore Circuit Court approved a settlement of over 6800 asbestos-injury cases, which had been pending in the system for years.⁹³

⁸⁹ Preliminary Reply of Judge MacQueen, *supra* note 77, at 1-2.

⁹⁰ W. Va. Mandamus Ruling, *supra* note 85, at 17.

⁹¹ *Id.* at 18. The West Virginia Supreme Court noted that it believed that any constitutional issues were premature because the specific types of trials to be held had not been decided yet. *Id.*

⁹² Memorandum and Opinion, *In re Baltimore City Asbestos Personal Injury and Wrongful Death Cases*, No. 92344501 (Baltimore Cir. Ct. May 9, 2001). In order to avoid similar problems, the Baltimore court subsequently adopted an inactive docket similar to those used in Massachusetts and Cook County, Illinois. *Id.* at 2. Challenges to the viability of that inactive docket have been denied. *Id.*

⁹³ Caitlin Francke, *Asbestos Lawsuits to Be Settled*, BALTIMORE SUN, Feb. 14, 2001, at 1-B, available at 2001 WL 6150935.

Mass trials and mass consolidations are perhaps the most obvious examples of case management techniques designed to resolve cases quickly but which actually end up encouraging the filing of more asbestos claims. Such procedures take the focus away from the merits of individual claims (while often ignoring the due process rights of defendants) and allow non-meritorious claims to flourish. More importantly, mass trials and mass consolidations provide a mechanism which increases the value of unimpaired claims at the expense of truly sick plaintiffs, further reducing the limited pools of resources and increasing the likelihood that future deserving claimants will not be fully compensated.

C. Medical Monitoring

Plaintiffs in medical monitoring cases seek post-exposure, pre-symptom recovery for the expense of periodic medical examinations to detect the onset of physical harm (which may or may not occur). Some courts have permitted recovery for medical monitoring, but many have rejected it.⁹⁴ Medical monitoring, like recovery for expected future impairment or fear thereof, may have its place in tort law, but in the asbestos litigation, this device has become a caricature.

Recognition of medical monitoring absent physical injury could have enormous consequences for asbestos litigation given the massive number of individuals who were exposed to asbestos at some level. If even a small fraction of these individuals were to seek recovery for medical monitoring, the effects on future claimants, the court system and the remaining solvent defendants could be far-reaching. As one court explained:

There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . Allowing today's generation of

⁹⁴ See generally Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1059-71 (1999) (discussing the case law on medical monitoring).

exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs [sic] being remediless.⁹⁵

These serious practical concerns led the United States Supreme Court in *Metro-North Commuter Railroad Co. v. Buckley*⁹⁶ to reject medical monitoring in Federal Employers' Liability Act (FELA)⁹⁷ cases.⁹⁸ One of the Court's primary concerns in *Buckley* was that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring."⁹⁹ As a result, defendants would be exposed to unlimited liability, and a "flood" of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury.¹⁰⁰ The Court concluded:

[W]e are more troubled than is [the dissent] by the potential systemic effects of creating a new, full-blown, tort law cause of action—for example, the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other.¹⁰¹

Equally instructive on this point is the Texas Supreme Court's more recent decision in *Temple-Inland Forest Products Corp. v. Carter*.¹⁰² In rejecting a "fear of disease" claim

⁹⁵ *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372. (S.D. W. Va. 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991).

⁹⁶ 521 U.S. 424 (1997).

⁹⁷ 45 U.S.C. §§ 51-60 (1994). FELA is a federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employer railroads. FELA is something like a tort equivalent of workers' compensation for the railroad field.

⁹⁸ *Buckley*, 521 U.S. at 442-43.

⁹⁹ *Id.* at 442.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 443-44. Similar concerns recently led the Nevada and Alabama Supreme Courts to reject medical monitoring in *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001), and *Hinton ex rel. Hinton v. Monsanto Co.*, 2001 WL 1073699 (Ala. Sept. 14, 2001).

¹⁰² 993 S.W.2d 88 (Tex. 1999).

brought by a person who was exposed to asbestos, but had no physical injury, the court explained:

The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period characteristic of asbestos-related diseases, make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not. This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared. Also, *claims for exposure could proliferate because in our society, as the Supreme Court observed, "contacts, even extensive contacts, with serious carcinogens are common."*¹⁰³

For this reason, the Texas Supreme Court was reluctant to stray from the bedrock rule, taken from the *Restatement (Second) of Torts*, that a showing of actual injury is an indispensable element of a tort cause of action.¹⁰⁴ The court stated: "If recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk," which would "exacerbate not only the multiplicity of suits but the unpredictability of results."¹⁰⁵

Sound public policy dictates that courts maintain the 200-year-old principle that causes of action generally require proof of a present physical injury.¹⁰⁶ The traditional physical injury

¹⁰³ *Temple-Inland*, 993 S.W.2d at 93 (emphasis added).

¹⁰⁴ See RESTATEMENT (SECOND) OF TORTS § 436A (1965) (stating that defendant should not be held liable for emotional disturbance absent physical injury); see also *Purjet v. Hess Oil V.I. Corp.*, 1986 WL 1200, *4 (D.V.I. Jan. 8, 1986) (applying Virgin Islands law) ("We are bound, however, to follow the Restatement's rule that actual injury is an indispensable element of a tort cause of action," including medical monitoring claims.)

¹⁰⁵ *Temple-Inland*, 993 S.W.2d at 93.

¹⁰⁶ See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF

rule serves a number of important functions with respect to medical monitoring claims. First, it prevents courts from being flooded with thousands of new claims. As one set of commentators has pointed out, with an estimated thirty-eight percent of all cancers attributable to occupational exposure to toxic chemicals and 50,000 hazardous waste sites in the United States, "in the very near future we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances and to get medical experts to testify that the exposure significantly increased our risk of disease."¹⁰⁷ It was precisely this concern that persuaded the United States Supreme Court to refuse to allow medical monitoring claims in the *Buckley* decision.¹⁰⁸

Furthermore, medical monitoring awards are often totally unnecessary. Most workers today already receive access to medical check-ups through a health plan.¹⁰⁹ A tort award would simply provide a windfall recovery. As the Supreme Court noted in *Buckley*, "where state and federal regulations already provide the relief that a [medical monitoring] plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits" because recovery would be allowed "irrespective of the presence of a 'collateral source.'"¹¹⁰

In addition, medical monitoring awards are subject to serious abuse. If awarded in a lump-sum, there is no guarantee that any recovery will actually be spent on medical monitor-

TORTS 361 (5th ed. 1984) (stating that the majority of courts do not allow recovery for mental distress unless there is a physical injury).

¹⁰⁷ Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 130 (1995); see also Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 13 (1998) ("According to the United States Environmental Protection Agency ("EPA"), billions of pounds of hazardous chemicals are emitted into the air each year, and nearly twenty percent of the U.S. population (approximately 40 million people) live within four miles of a hazardous waste site that the EPA has placed on its National Priority List.") (footnotes omitted).

¹⁰⁸ See *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997).

¹⁰⁹ Approximately eighty percent of all standard medical testing is paid for by third-party insurance. 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 379 (1991).

¹¹⁰ *Buckley*, 521 U.S. at 443.

ing.¹¹¹ In fact, evidence suggests that lump-sum awards are more likely to be spent in the short-term than to be saved for future medical monitoring.¹¹² This will almost certainly be true in the vast majority of cases where monitoring is already provided by a "collateral source."

Moreover, the social risk associated with making medical monitoring too readily available to the millions of persons in our society who can claim exposure to toxic substances, including asbestos, will have the effect of compensating those who are unimpaired or slightly impaired at the expense of those who are seriously injured. When courts permit large damage awards for medical monitoring, less money is available to compensate those who have serious injuries or will develop serious injuries in the future.

These serious problems will only be exacerbated if claimants seeking medical monitoring are permitted to pursue recovery through the vehicle of class action litigation. People who suffer actual asbestos-related injuries may be unable to obtain compensation for their injuries if funds are further depleted for monitoring classes of individuals who have no present physical injury, and may never become sick.

Despite these facts, some state courts still permit plaintiffs to recover damages for medical monitoring even in the absence of injury. In 1998, the Supreme Court of Louisiana, in a suit brought on behalf of a class of plaintiffs that had not filed suit for asbestos disease or injury, ruled that for an asymptomatic claimant exposed to asbestos, "the reasonable cost of medical monitoring is a compensable item of damage . . . provided that a plaintiff satisfies [certain] criteria."¹¹³ As a result of this

¹¹¹ As one commentator has noted, "[t]he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible." Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 540-41 (2000).

¹¹² George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 257 n.158 (1993) (footnote in title omitted).

¹¹³ *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188, pp. 8-9 (La. 7/8/98), 716 So. 2d 355, 360. The court identified seven criteria that needed to be established:

ruling, the Louisiana Legislature amended its law to eliminate medical monitoring as a compensable item. Specifically, the amendment stated, "Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a *manifest physical or mental injury or disease*."¹¹⁴

But in April of 2001, the Louisiana Supreme Court spoke again on the issue, this time holding that the Legislature's decision to eliminate medical monitoring was unconstitutional to the extent that the law was applied retroactively (i.e., to the extent the plaintiff already had a "vested property right" in a cause of action it could not be divested by a subsequent statute).¹¹⁵ The upshot of the ruling was to permit large numbers of claimants who acknowledged they were unimpaired to seek

(1) Significant exposure to a proven hazardous substance.

....

(2) As a proximate result of the exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

....

(3) Plaintiff's risk of contracting such a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease.

....

(4) A monitoring procedure exists that makes the early detection of the disease possible.

....

(5) The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles.

....

(6) The prescribed monitoring regime is different from that normally recommended in the absence of exposure.

....

(7) There is some demonstrated clinical value in the early detection and diagnosis of the disease.

Bourgeois, pp. 9-11, 716 So. 2d at 360-61. To this list, the court added that the "costs must be both reasonable and limited in duration to the maximum latency period (if known) of the diseases for which there is an increased risk" *Id.* at p. 11, 716 So. 2d at 361.

¹¹⁴ LA. CIV. CODE ANN. art. 2315 (West 1997 & Supp. 2001) (emphasis added)

¹¹⁵ *Bourgeois v. A.P. Green Indus., Inc.*, 2000-1528, pp. 11-12 (La. 4/3/01), 783 So. 2d 1251, 1260-61.

medical monitoring costs in the courts, depleting funds available to compensate those claimants who are or may become sick.¹¹⁶

D. Managing Punitive Damages Claims

Continuing to award punitive damages in asbestos cases no longer makes sense. The purpose of punitive damages in product liability cases is to punish manufacturers for the injuries their products caused and to deter others from doing the same.¹¹⁷ It would be difficult to argue that punitive damages awards in asbestos cases over the past twenty years have not adequately punished asbestos manufacturers. Moreover, individuals responsible for decisions relating to asbestos products no longer work at these corporations and in most cases are dead. Punishing corporations for decisions made years before the present management was in power does not serve the purpose of punitive damages.

When the threat of large punitive damage awards is used to increase settlement amounts, punitive damages become a means of extortion rather than the corrective and deterrent they are intended to be. Thus, continued use of punitive damages not only violates a defendant's rights,¹¹⁸ it threatens fu-

¹¹⁶ The court held that because the plaintiffs, before passage of the statute, had filed an amended petition alleging the seven criteria, they could pursue their medical monitoring claims. *Bourgeois II*, p. 12, 783 So. 2d at 1260-61; see *Crooks v. Metro. Life Ins. Co.*, 2001-0466, pp. 3-4 (La. 5/25/01), 785 So. 2d 810, 812 (stating that the court should determine whether the seven criteria from *Bourgeois I* occurred before Act 989 went into effect).

¹¹⁷ See, e.g., RESTATEMENT OF TORTS § 908 cmt. a (1939) (noting that the functions of punitive damages are punishment and deterrence); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 549 (10th ed. 2000) (describing the origin and purpose of punitive damages).

¹¹⁸ See *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1031 (5th Cir. 1990) ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context."); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("[D]ue process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct."); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J. 1989) ("[T]he

ture plaintiffs by driving defendant corporations into bankruptcy, thereby depleting the pool available for compensatory damages.¹¹⁹

The United States Court of Appeals for the Third Circuit recently recognized many of these same concerns. In *In re Collins*,¹²⁰ the Third Circuit had the opportunity to consider the Judicial Panel on Multidistrict Litigation's decision not to remand punitive damages claims for trial together with the remainder of personal injury claims arising from asbestos exposure.¹²¹ The court was convinced that there was a "compelling" public policy rationale for severing the claimants' punitive damage claims:

The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating. It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand. It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.¹²²

court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labeled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment.").

¹¹⁹ See *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims"); *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

¹²⁰ 233 F.3d 809 (3d Cir. 2000), *cert. denied sub nom.*, *Collins v. Mac-Millan Bloedel, Inc.*, 121 S. Ct. 2216 (2001).

¹²¹ *Collins*, 233 F.3d at 810.

¹²² *Id.* at 812. Other courts have also severed punitive damages claims. For example, in Northampton County, Pennsylvania, Judge Panella severed all punitive damages claims from discovery, pre-trial motions and trial, ruling that any

Yet many courts have not been willing to take similar steps to curb the impact of punitive damages claims. For instance, the Supreme Court of Montana had to decide whether W.R. Grace & Co. could present evidence of the scope of asbestos litigation it faced as well as hypothetical average amounts for each pending claim during a mini-trial on punitive damages.¹²³ The purpose of that evidence was to show that an award of punitive damages could threaten the ability of sick claimants to obtain compensation.¹²⁴ The trial court permitted W.R. Grace to introduce an economic expert who performed a series of calculations in order to approximate the potential damages facing the company in comparison to the company's net worth.¹²⁵

However, the Montana Supreme Court ruled that the trial court abused its discretion in admitting this evidence – finding that such evidence is irrelevant to the issue of punitive damages, as well as “highly speculative.”¹²⁶ On remand, W.R. Grace would have been unable to introduce such expert testimony and thus, the jury would have been unaware of the impact of a large punitive damages award on seriously ill claimants. W.R. Grace has since sought bankruptcy protection following a flood of new asbestos claims.

III. A GLOBAL VIEW IS NEEDED

In mass tort litigation, such as the asbestos litigation, when a judge in one state acts, he or she not only affects the plaintiffs and defendants in that state, but also current and future plaintiffs and defendants in all other states. Imagine the frustration of one judge, coping with the impact of depleted funds and mounting bankruptcies by setting for trial only the

discovery with respect to punitive damages would not occur until after a plaintiff was successful on his compensatory damages claims. *In re Asbestos Litig.*, No. C0048GV2001000003, slip. op. at 2 (Ct. of Common Pleas of Northampton County, Pa. Jan. 11, 2001).

¹²³ *Finstad v. W.R. Grace & Co.*, 2000 MT 228, ¶ 7, 8 P.3d 778, 781.

¹²⁴ *Finstad*, ¶ 46, 8 P.3d at 787.

¹²⁵ *Id.* ¶ 40, 8 P.3d at 785.

¹²⁶ *Id.* ¶¶ 48-49, 8 P.3d at 787.

cases of those who are sick or have died from an asbestos disease, watching a judge in another state allow unimpaired claimants to achieve compensation as part of a mass consolidated trial. With no end in sight to the asbestos litigation crisis, courts must reexamine the procedural mechanisms and substantive rules they have adopted to determine whether they are actually making the problem worse.

Unfortunately, courts are often hesitant to take a global view of the problem at the expense of the citizens of their state. For example, a state judge may be unwilling to prevent plaintiffs in his or her state from receiving punitive damages if a similarly situated plaintiff in another state will not be precluded from receiving them.¹²⁷ This state-centric view of the litigation is not just a theory. For example, in West Virginia, the plaintiff's submission to the West Virginia Mass Litigation Panel actually argued that a mass consolidated trial of all asbestos claims was necessary because of the supposed "risk of bankruptcy filings on the part of the remaining asbestos manufacturing defendants" as well as "the drain of defendant dollars to other litigation in other states where litigation plans are in effect."¹²⁸ More specifically, the plaintiffs argued that "if the dollars are not being demanded in West Virginia, they will be spent elsewhere until they are all gone."¹²⁹

¹²⁷ See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967) (noting that "a state otherwise willing to impose such self-denying limits might be disinclined to do so until assured that others would follow suit").

¹²⁸ Plaintiffs' Motion for Mass Trial, *supra* note 86, at 7.

¹²⁹ *Id.* at 7 n.3. In two separate opinions, the West Virginia Supreme Court of Appeals has reflected on this potential transfer of wealth in general. In *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the court stated:

State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the *national* economy and *national* welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.

Garnes, 413 S.E.2d at 905. Earlier in *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991), the court opined:

The lack of a coordinated approach results in compensation based on forum rather than merit. A recent settlement illustrates this problem. In November of 1999, eighteen of the nation's leading asbestos makers agreed to settle two of the largest asbestos personal injury cases for \$160 million.¹³⁰ However, the money was not allocated to plaintiffs based on the severity of injury, but apparently on where they lived.¹³¹ For example, \$263,000 went to each of 246 plaintiffs who lived in four counties in Mississippi and who suffered injuries.¹³² Seven Texas plaintiffs only received \$43,500 each.¹³³ But 2645 residents of Ohio, Indiana and Pennsylvania who had similar injuries only received \$14,000 each.¹³⁴

In the absence of federal legislation, judges must look outside their own "asbestos fiefdoms"¹³⁵ and make decisions that will help resolve the problem at a national level. They must cooperate and work toward a global approach to these cases. "Through [such] cooperation, judges can promote efficiency and

Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Blankenship, 406 S.E.2d. at 786.

¹³⁰ See Labatron, *supra* note 63 (noting that these Mississippi cases involved almost 4000 plaintiffs from five states).

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1880 (2000). Professor McGovern stated that the "ubiquity and massness of the tort should lead to cooperation among judges." *Id.* at 1867. He proposed a cooperative strategy that judges can use to deal with the many problems associated with mass torts. Specifically, Professor McGovern offered four proposals: "(1) revise the MDL rule or approach to make the strategy explicit; (2) revise Rule 23 to allow for more comprehensive settlements; (3) provide institutional support for state judges and for cooperative efforts; and (4) revise the *Manual for Complex Litigation* to educate judges concerning cooperative institutional strategy." *Id.* at 1892.

horizontal equity in the adjudication.”¹³⁶ Cooperation on a global level will serve two immediate goals—“eliminating redundancy and promoting consistency.”¹³⁷ Additionally, cooperation today would assure the long-term goal of compensating claimants who become truly sick in the future.

A. Take Steps to Control Claims by the Unimpaired

Courts must be willing to distinguish between the claims of those who are truly sick and those who are not. The adoption of inactive dockets by courts in Illinois, Massachusetts and Maryland is a good example of a method of controlling claims by the unimpaired. The unwillingness of the Pennsylvania Supreme Court to recognize a cause of action by claimants who are asymptomatic is another. Until courts take steps to control claims by the unimpaired, court dockets will continue to be clogged by such claims, and the limited resources available to those who are truly sick will continue to be depleted.

B. Strictly Enforce Joinder and Venue Rules to Prevent Forum Shopping

Courts need to be more assertive in requiring that claimants have had some substantive contact with the state in which they have filed suit. Thousands of cases are filed in states like Mississippi even though the claimants have no connection to the state because Mississippi's joinder rules are so liberal. Similarly, the streamlining of judicial procedures encourages out-of-state residents to file suit in Ohio. One solution would be for courts to require that plaintiffs either have been exposed to asbestos in the state or live or work in the state in which they file suit. Doing so would decrease forum shopping while also unclogging state courts faced with lawsuits by thousands of individuals who literally have no relationship to that state. In-state plaintiffs who pay taxes to keep the state courthouses open would benefit by having their claims heard faster.

¹³⁶ *Id.* at 1867.

¹³⁷ *Id.* at 1872.

C. Bring More Cases Before Fewer Judges

Many states have procedures which allow for the consolidation of cases from across that state to be transferred to a single judge. These types of procedures have been used by states in other mass tort contexts such as Fen/Phen and silicone breast implants.¹³⁸ A more consistent approach to the handling of the asbestos litigation can be achieved if the number of judges responsible for managing asbestos cases is reduced.¹³⁹

D. Provide Institutional Support

More formal mechanisms should be adopted to provide opportunities for judges from across the country to share their views and experiences concerning the asbestos litigation. Organizations such as the National Judicial College and ad hoc state court committees have provided forums for improved communication in the past, but additional steps should be taken. An organization that maintained claimant statistics, compiled case management orders and opinions and provided a forum for increased communication would provide judges with an important resource to draw upon as they try to balance their need to move cases along with the need to protect both the availability of funds to compensate the truly sick and the rights of defendants.¹⁴⁰ Making this information available to litigants may also streamline the parties' ability to work out

¹³⁸ *Id.* at 1886-87.

¹³⁹ One solution of course would be to revise the multi-district litigation (MDL) rules to allow both state and federal claims to be transferred to a single judge. As Professor McGovern explains, "[i]f the MDL statute were amended to allow the transferee judge to oversee pretrial discovery for both federal and state cases, it would be possible to reduce much of the redundant discovery." *Id.* at 1892. Additionally, if the MDL judge had greater powers, such as the ability to defer aggregation or settlement until the marketplace has spoken, or to eliminate incentives to file claims prematurely (e.g., toll the statute of limitations), "then the premature massness that preempts a liability determination could be lessened." *Id.*

¹⁴⁰ Professor McGovern conceptualizes a National Center for State Courts, funded by the State Justice Institute, which would establish an "institutional mechanism . . . to share information and provide limited support" so that there would be "a permanent method of insuring a more effective state marketplace of litigation." *Id.* at 1894.

case management and discovery matters with less court involvement.

E. Use the Tools that Already Exist

While some common-sense innovations, such as inactive dockets, are available to the courts, many judges do not have to look past their own court rules to improve the asbestos problem. One of the reasons that more and more asbestos claims are being filed is that courts have been unwilling to treat asbestos claims like they would other tort claims. Judges need to require plaintiffs to meet their burden of proof and be willing to dismiss cases on summary judgment if that burden is not met. Furthermore, judges need to enforce the procedural rights of defendants and, in particular, the rights of defendants to full discovery. The time required to enforce the rule of law now will actually save time in the future because the incentive to file frivolous or marginal claims will have been eliminated.

IV. THE COURTS ARE THE ONLY PRACTICAL SOLUTION

In *Ortiz v. Fibreboard Corp.*,¹⁴¹ United States Supreme Court Justice David Souter stated that "the elephantine mass of asbestos cases . . . defies customary judicial administration."¹⁴² As one Third Circuit Judge commented:

Unquestionably, a national solution is needed. Despite the deteriorating situation, Congress has declined to act and class actions are inadequate remedy. . . .

. . . Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.¹⁴³

¹⁴¹ 527 U.S. 815 (1999).

¹⁴² *Ortiz*, 527 U.S. at 821; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.") (footnote omitted).

¹⁴³ *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting) (footnote

Even more recently, in discussing the need for a legislative solution, one Maryland District Court Judge recognized:

the need for developing less complex and more responsive and responsible ways of sorting out the blame and cost for industrial-age ills such as asbestosis than a system of litigation meant to sort out competing claims to straying cattle. Yet, the system lumbers on because no one has the incentive or initiative to change it, perhaps because everyone is so invested in the status quo.¹⁴⁴

The need for a national solution has never been stronger than it is today, where over thirty companies have been forced into bankruptcy as a result of asbestos-related litigation, where the number of cases on court dockets continues to grow at epidemic proportions and where claimants who get sick in the future run the risk of undercompensation or no compensation at all. However, without federal legislation, which remains speculative, only the courts can take steps to improve the asbestos litigation environment. Mechanisms designed to move cases along have failed. Courts must be willing to try new techniques, such as inactive dockets, and at the same time enforce those rules—tort standards and forum limitations—that already exist. Whichever path they choose, the courts must do something now before the problem gets even worse.

omitted), *modified on other grounds*, 13 F.3d 58 (3d Cir. 1993).

¹⁴⁴ *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 133 F. Supp. 2d 747, 751 (D. Md. 2001).

MURDER AND MANSLAUGHTER IN MISSISSIPPI: UNINTENTIONAL KILLINGS

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A man's state of mind is hard enough for him to know, much less for others to prove without his help.¹

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¹ Windham v. State, 602 So. 2d 798, 807 (Miss. 1992) (Robertson, J., concurring).

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INTRODUCTION

Mississippi law classifies certain unintentional killings as capital murder,² murder,³ and manslaughter.⁴ It also imposes severe criminal sanctions on persons driving under the influence of intoxicating liquor or drugs who kill under circumstances that do not require intent.⁵ But Mississippi law is confusing in its treatment of the culpable mental states that distinguish these different forms of criminal homicide. The elements required by statute are not obvious; appellate cases conflict regarding the adequacy of evidence to support convictions; and the law on jury instructions is inconsistent.

This article discusses the law of unintentional homicide in Mississippi. It also considers the law governing intended killings to the extent legal definitions of intent illuminate the

² MISS. CODE ANN. § 97-3-19(2) (2000).

³ *Id.* § 97-3-19(1).

⁴ *Id.* §§ 97-3-27 to -33, -39 to -47.

⁵ *Id.* § 63-11-30(1) (1996 & Supp. 2001). The code gives the statute the general title "Operation of vehicle while under the influence of intoxicating liquor, drugs or controlled substances, or other substances impairing ability to operate vehicle" *Id.* § 63-11-30. The offense consists of driving while intoxicated and causing either death or certain injuries. *Id.*; see *infra* notes 181-89 and accompanying text. The court has referred to the offense as "aggravated DUI." *Mayfield v. State*, 612 So. 2d 1120, 1126 (Miss. 1992).

Although this article considers the offense in connection with homicide crimes, the supreme court has concluded that aggravated DUI is not a homicide in important respects. *Mayfield*, 612 So. 2d at 1126-28. It reasons that the statute is principally designed to punish driving while intoxicated, not homicide, and that the punishment is increased for accidents resulting in certain injuries or death. *Id.* at 1127. According to Justice McRae, a single act of intoxicated driving resulting in multiple injuries or death constitutes a single offense. *Id.* at 1128. Justices Banks and Roberts dissented with respect to this part of the opinion, *id.* at 1130, and Justice Banks rightly challenged the court's reliance on the title of the statute as evidence of the legislature's intention. *Id.* at 1130-31 (Banks, J., concurring in part and dissenting in part).

requirements for unintended killings. It does not, however, separately consider capital murder or murder liability for unintended killings committed during the commission of or attempt to commit felonies.⁶ Nor does it separately consider capital murder or murder liability that results under the doctrine of transferred intent—that is, when an unintended victim dies as the result of the attempted murder of another.⁷

Because there is little published scholarship on Mississippi homicide law, Part I examines the history of murder and manslaughter in Mississippi. Part II compares the treatment of unintentional criminal homicide in Mississippi with that in other jurisdictions. Part III analyzes the culpable mental states required for unintentional murder and manslaughter in Mississippi. Part IV explores conflicts and inconsistencies in cases evaluating the sufficiency of evidence and the need for jury

⁶ Mississippi defines as murder, killings without authority of law:

done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies.

MISS. CODE ANN. § 97-3-19(1)(c) (2000). The language “without any design” makes explicit the fact that the state has to prove no mens rea with respect to the killing other than the mens rea and other elements of the felony; it is not intended to require the state to prove the absence of any design. The listed felonies are excluded because they are predicate felonies for capital murder in Mississippi. Capital murder includes a killing without authority of law:

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony.

Id. § 97-3-19(2)(e), (f).

⁷ This common law doctrine is partly codified in Mississippi, which defines murder to include a killing “done with deliberate design to effect the death of the person killed, or of any human being.” *Id.* § 97-3-19(1)(a) (emphasis added); see *Ross v. State*, 131 So. 367, 368 (Miss. 1930) (holding that “the accidental killing of a person other than the one intended is murder”).

instructions. The conclusion suggests possible legislative and judicial solutions to the present confusing and inequitable state of the law.

I. HISTORICAL BACKGROUND

A. Common Law

William Blackstone defined murder in the eighteenth century as occurring "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied."⁸ As Blackstone recognized, malice provided the mental element that distinguished murder from other homicide crimes and from noncriminal homicide:

This [malice aforethought] is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart: *un disposition a faire un mal chose* [an inclination to do an evil thing]: and it may be either *express*, or *implied* in law.⁹

Some scholars believe malice aforethought originally meant a preconceived design to kill.¹⁰ They speculate that the distinc-

⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES *195. Blackstone purported to quote Coke's seventeenth-century definition. Coke's words were:

Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any County of the Realm any reasonable creature *in rerum natura* under the kings peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same.

3 EDWARD COKE, INSTITUTES *47.

⁹ 4 BLACKSTONE, *supra* note 8, at *198.

¹⁰ LaFave says that after manslaughter arose as a separate form of felonious homicide, the defining element of "malice aforethought" for murder "required at least an intent to kill, plus perhaps an element of hatred, spite or ill-will." WAYNE R. LAFAVE, CRIMINAL LAW § 7.1(a), at 654 (3d ed. 2000). Dressler makes a similar point. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.02[B], at 503-04 (3d ed. 2001) ("In very early English history, the word 'aforethought' probably required that a person think about, or premeditate, the homicide long before

tion between express and implied malice evolved as courts extended murder liability from intended to unintended killings.¹¹ In some statutory schemes express malice is likewise defined as an intent to kill.¹² But malice aforethought proba-

the time of the killing.”).

It is questionable whether other early societies required intent for homicide liability. *Cf. Exodus* 21:12 (Revised Standard Version) (“Whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee.”); *Deuteronomy* 19:4-5 (Revised Standard Version) (“This is the provision for the manslayer, who by fleeing there may save his life. If any one kills his neighbor unintentionally without having been at enmity with him in time past—as when a man goes into the forest with his neighbor to cut wood and his hand swings the axe to cut down a tree, and the head slips from the handle and strikes his neighbor so that he dies—he may flee to one of these cities and save his life. . . .”); *Numbers* 35:9-11 (Revised Standard Version) (“And the Lord said to Moses, ‘Say to the people of Israel, When you cross the Jordan into the land of Canaan, then you shall select cities to be cities of refuge for you, that the manslayer who kills any person without intent may flee there.’”).

¹¹ LAFAVE, *supra* note 10, § 7.1(a), at 654-55.

The judges still continued to say that murder is committed by one who unlawfully kills another “with malice aforethought,” now however adding the phrase “express or implied,” the word “implied” covering the four situations just described wherein literally there exists no premeditated intent to kill.

Id. I am not sure of the origin of this theory but it is fully articulated by Sir James Fitzjames Stephen who summarized the history of the caselaw: “First *malice prepense* is half accidentally made the test of murder. It is then defined to mean a deliberate premeditated design to kill or hurt.” 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 63 (London, MacMillan 1883). Stephen claimed that malice was further enlarged by the presumption in fact that malice existed in the absence of evidence of provocation. *Id.* He argued that this presumption evolved into an irrebuttable legal presumption. *Id.* As a result, the legal content of malice became provided largely by the development of the doctrine of provocation.

¹² The California Penal Code defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.” CAL. PENAL CODE § 187 (West 1999). It then provides:

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Id. § 188.

The California statute modifies the common law in classifying the killing of a fetus as murder. *Id.* At common law the killing of a fetus was not murder; but if the child was born alive and died after birth of injuries inflicted before birth—with malice aforethought—it would qualify as murder. *See* 4 BLACKSTONE, *supra* note 8,

bly did not originally mean premeditation.¹³ After the Norman

at *198 ("To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them."). Lord Hale maintained that even under such circumstances, the resulting death was not murder. *Williams v. State*, 561 A.2d 216, 217-18 (Md. 1989) (citing 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 433 (P.R. Glazebrook ed., Profl Books Ltd. 1987) (1736)). But Blackstone's view has prevailed in most American jurisdictions. See, e.g., *Williams*, 561 A.2d at 219 (upholding defendant's conviction for manslaughter of baby which was born alive but died hours later because of injury inflicted on mother).

¹³ Murder under Anglo Saxon jurisprudence denoted a particular kind of secret killing, originally where the killer hid the body and later where the killer attacked secretly or concealed his identity from others. THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800*, at 53 (1985). Whether intent was required at first is not known, but Green suggests that liability could be mitigated if the homicide was unintentional. *Id.* at 51. In any event, stealth, not premeditation, was the operative element. *Id.* at 53. For example, Green cites a case from 1400 where a defendant who stabbed a victim in the back after an argument was convicted of murder. *Id.* at 57.

Baker maintains that "the principle of automatic liability was applied to the man whose conduct killed another" and concludes that the requirement of *mens rea* emerged through pardons that became available for accidental or excusable homicides. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 601 n.33 (3d ed. 1990). While excuses included self-defense and "misadventure," I am aware of no cases where murder resulting from a hostile and unprovoked assault was pardoned because the death was unintended. By the time of Blackstone, homicide *per infortunium* or *misadventure* was narrowly defined as:

[W]here a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man: for the act is lawful, and the effect is merely accidental.

4 BLACKSTONE, *supra* note 8, at *182 (footnote omitted). Blackstone is obviously citing to *Deuteronomy*. See *supra* note 10.

While Green has provided the most searching and plausible account of the early origins of murder (and malice aforethought), much still remains unknown. See GREEN, *supra*, at 51-53. Part of the problem arises from the difficulty of projecting contemporary norms onto the past. Green, like others, assumes that thirteenth-century jurors distinguished between intended and unintended consequences, but this may be a more modern construct. See *id.*

An additional difficulty arises from the instrumental assumptions that murder developed in close association with *murdrum*. *Id.* *Murdrum* was a fine for secret killings imposed after the conquest. *Id.* at 51. It is unclear whether it was limited to intentional killings. *Id.* at 53. "In some counties a *murdrum* was exacted by custom in case of accidental death; Bracton regarded this as an abuse, and . . . it

Conquest, the king's common law courts assumed jurisdiction over all homicides, and the malice aforethought required for murder acquired its distinct meanings as the courts distinguished murder from homicides resulting from the sudden fights and provocation that became classified as manslaughter.¹⁴ Accordingly, malice aforethought probably required not a

was abolished." 2 FREDERIC POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 487 (Cambridge Univ. Press 1923) (2d ed. 1898). The background assumption in instrumental theories is that before the Conquest, special royal jurisdiction for other homicides (where the identity of the killer was known) was unnecessary because the kin would obtain relief through the *wergild* (and the king would obtain his *wite*). GREEN, *supra*, at 51. Murder, in contrast, threatened to disrupt the normal process of composition and could lead to feuds. *Id.* After the Conquest, the crown assumed a monopoly over all felonies extending liability to all homicides, not just murder. *Id.* at 50. And the crown imposed a special fine of *murdrum* on the community that was unable to prove that the homicide victim was not Norman. *Id.* at 51. See generally 3 STEPHEN, *supra* note 11, at 31. But as Green shows, the community's resistance to imposing the death penalty on all killers ultimately led to the emergence of distinct principles of excuse and to the separate crime of manslaughter. GREEN, *supra*, at 52.

Nevertheless, instrumental explanations do not account for all important features of Anglo Saxon homicide law and may not fully explain the community's continuing abhorrence for certain forms of homicide after the Conquest, and to its concomitant resistance to imposing capital punishment on other forms of homicide. *Id.* at 51-53. It seems implausible, for example, that murder became the worst form of homicide because of the resentment of fines imposed under Englishry, as Stephen claimed. 3 STEPHEN, *supra* note 11, at 40. Similarly, Green demonstrated that the community abhorrence of secret killings predated Englishry and explained the community's reluctance to convict other killers. GREEN, *supra*, at 53.

The deep roots of such abhorrence are not clear. Secret killings (especially those in which a body was concealed in the earth) have been viewed with special horror in other contexts. Cain's fratricide was aggravated by spilling his brother's blood on the ground. *Genesis* 4:10 (Revised Standard Version) ("The voice of your brother's blood is crying to me from the ground."). The account of Moses killing the Egyptian included the significant detail that he hid the corpse in the sand. *Exodus* 2:12 (Revised Standard Version). These acts of concealing the victim's body in the ground literally polluted the earth. And by preventing the rituals necessary to propitiate the spirit of the dead and assure its future, such concealing may have offended deep social norms. Such norms were the source of the central conflict in *Antigone*, and residues of them may survive in the law's prohibition of "Christian burial" speeches to elicit confessions or in the horror provoked where defense lawyers obtained knowledge of the location of the hidden bodies of homicide victims.

In any event, Green concludes that in the fourteenth century the threshold meaning of malice aforethought was "mere deliberateness," though the term could also mean "true premeditation." GREEN, *supra*, at 56.

¹⁴ GREEN, *supra* note 13, at 51. It is generally assumed that the various

goal-directed intent to kill so much as a preexisting hostility to the victim.¹⁵

As late as Blackstone, the distinction between express and implied malice related more to the objective evidence of motivation of ill will directed toward the particular victim.¹⁶ A cold-blooded or premeditated killing certainly provides an example

forms of homicide discussed by Bracton (d. 1268) were felonious, except those that he specifically stated did not impose liability. But his text is ambiguous and difficult to reconstruct. He divided homicide into unintentional (*casu*) and intentional (*voluntate*), and concluded that unintentional homicide established liability only when the actor was engaged in an improper act. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (Samuel E. Thorne trans., George E. Woodbine ed., 1968). He further divided intentional homicide into "homicide committed openly and in the presence of many bystanders" and "homicide committed in secret, in no one's presence, to no one's knowledge, and in no one's sight or hearing, which is called murder [*murdrum*]." *Id.* at 378-79.

As the law developed, Baker concludes that the main form of felonious homicide besides murder became "chance medley." BAKER, *supra* note 13, at 601. This, he suggests, was a corruption of *chaude mêlée* (literally "hot conflict"). *Id.* at 601 n.40. Accordingly, malice aforethought would have served functionally to distinguish those killings that were not the result of a sudden or spontaneous quarrel. The clearest refutation of such a quarrel would, of course, have been evidence of longstanding ill will by the killer towards the victim. But the functional distinction was not coherent.

Malice was not easy to define, and even harder to prove; often it had to be implied from the facts surrounding the killing. So long as there was a general evil intent, an intent to injure someone, there was no need to prove a specific intent to kill the deceased. Moreover, a chance fight, if unprovoked, might itself be murderous.

Id. at 602.

¹⁵ GREEN, *supra* note 13, at 56-57. Green makes the important observation that the distinction between injuring and killing may have held less significance "in a day when fights began easily and led often to death due to sepsis or other results of poor medical techniques." *Id.* at 51.

To this we might add, however, that we have little way of gauging the *faith* of patients and their kin in such medical techniques that would affect their judgment of responsibility for the resulting death. In a world still haunted by occult powers, residues of convictions that aggressive emotions like hatred and jealousy themselves operated to bring about harm could also have provided content to "malice aforethought."

¹⁶ Blackstone defined express malice as:

[w]hen one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.

4 BLACKSTONE, *supra* note 8, at *199.

of express malice, but the examples Blackstone chose were more nuanced. His examples of express malice included duels and killings in response to a sudden provocation where the killer beat the victim in a cruel and unusual manner but did not necessarily mean to cause the victim's death.¹⁷ These examples share the feature that death occurred in contexts where the killer's hostility was transparent or notorious, and the hostility motivated the fatal assault on the victim. For Blackstone express malice also included killings that demonstrated a general animosity to all humans.¹⁸ As examples he cited a killer who "coolly discharg[ed] a gun among a multitude of people" and conspirators who agreed to engage in a violent offense "of which the probable consequence might be bloodshed"¹⁹ but not necessarily death. Express malice in these contexts included "an express evil design, the genuine sense of *malitia*."²⁰

Implied malice, in contrast, included deliberate killings where no additional evidence of hostile motive was present.²¹ This distinction between express and implied malice derived from Coke who had explained malice prepense as existing

¹⁷ "Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*." *Id.*

For Blackstone the disproportionate response to the provocation established malice that prevented the killing from being mitigated to manslaughter. *Id.* at *200. When the Mississippi Code provided generally that provoked killings were excusable homicide, see MISS. CODE ANN. § 97-3-17(b) (2000), the legislature nevertheless provided that a killing in a cruel or unusual manner provided an element for manslaughter. See *id.* § 97-3-35 ("The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter.").

¹⁸ 4 BLACKSTONE, *supra* note 8, at *199-200. In such circumstances, a lesser crime would not be appropriate. *Id.*

¹⁹ *Id.* at *200. Blackstone said it was murder "because of the unlawful act, the *malitia praecogitata*, or evil intended beforehand." *Id.*

²⁰ *Id.* at *199. Blackstone also gave the example of a park-keeper who tied a boy to a horse's tail and dragged him through the park because he stole some wood. *Id.*

²¹ See *id.* at *200. ("Also, in many cases where no malice is expressed, the law will imply it: as, where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved.").

"when one compasseth to kill, wound, or beat another, and doth it *sedata animo*."²² Coke had also observed that malice was implied when one killed "without any provocation on the part of him, that is slain,"²³ though Coke's understanding of implied malice evidently did not include acts of extreme recklessness.²⁴ Hale followed Coke,²⁵ and Blackstone followed both in

²² 3 COKE, *supra* note 8, at *51. Stephen could not understand why such malice was "implied" for Coke, arguing that if the unprovoked killing was intended, then it was accompanied by express malice, but if it was unintentional, then there was no malice. 3 STEPHEN, *supra* note 11, at 55.

²³ 3 COKE, *supra* note 8, at *52.

²⁴ See 3 STEPHEN, *supra* note 11, at 56. Stephen thought that Coke's omission was surprising because Coke had included extreme recklessness as a form of mens rea for liability under the mayhem statute. *Id.* And Stephen was convinced that the omission was not grounded on a defensible moral principle: "As far as wickedness goes it is extremely difficult to suggest any distinction worth taking between an intention to inflict bodily injury and reckless indifference whether it is inflicted or not." *Id.*

²⁵ Hale divided malice into "malice in fact" and "malice in law, or *ex praesumptione legis*," and defined the former: "Malice in fact is a deliberate intention of doing some corporal harm to the person of another." 1 HALE, *supra* note 12, at 451. He further divided implied malice into three kinds:

1. When the homicide is voluntarily committed without provocation. 2. When done upon an officer or minister of justice. 3. When done by a person, that intends a theft or burglary.

Id. at 455. The second two categories correspond to killings while resisting lawful arrests and felony murder.

As had Coke, Hale assumed that implied malice required an intent to kill. This was evident both in his definition that the homicide be "voluntarily committed" and in his discussion of cases. *Id.* Indeed, Hale apparently never questioned the need for such intent, for his case analysis focused on elaborating circumstances that failed to establish mitigating provocation. *Id.* at 456-57. In most of the cases discussed by Hale, the killers respond to legally insufficient provocation with blows patently intended to kill or seriously injure. See *id.* But in one case a woman in a tavern directed insulting language at the defendant who threw a broom staff at her from some distance. *Id.* at 456. The broom hit her head and killed her. *Id.* The justices concluded easily that the words were not sufficient provocation and that the homicide would be murder if caused by a firearm or sword. *Id.* at 456-57. But they could not agree

whether this striking, that was so improbable to cause death, [would] not alter the case; the judges were not unanimous in it, and in respect, that the consequences of a resolution on either side was great, it was advised the king should be moved to pardon him, which was accordingly done.

Id. at 457. Though the case appears at first as though there was considerable authority for finding that the unintended killing could qualify as murder, the result (a pardon for excusable homicide rather than mitigation to manslaughter)

defining implied malice to include a killing that occurred suddenly and in the absence of any other evidence of particular ill will: "And if a man kills another suddenly, without any, or without a considerable, provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause."²⁶ Thus for Blackstone implied malice was a residual category. It covered all murders that were not accompanied by express malice, and it also provided the theoretical justification for the doctrines of felony murder and transferred intent.²⁷

From the cases Blackstone derived "a general rule, that all homicide is malicious, and, of course, amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or *alleviated* [mitigated] into manslaughter."²⁸ He also posited a

strongly suggests that the consensus was that a genuinely unintended death should not qualify as murder. It is not clear whether Hale thought the sex of the victim was important because it aggravated the affront of the insulting words at issue, because it aggravated the disproportionate response of the defendant to the insult, or because it reduced the inference that the defendant's assault was designed to initiate an affray likely to result in death.

This result of the case was surprising if the defendant intended to strike the victim with the broom (an assault), for Coke failed to distinguish between the severity of bodily injury intended. See 3 STEPHEN, *supra* note 11, at 57 (criticizing Coke for promoting as murder the death that resulted from any unlawful act and any intent to injure, not just intent to inflict serious injury). Moreover, it was well-established that even an unintended death resulting from an unlawful act (like assault) would be manslaughter. 4 BLACKSTONE, *supra* note 8, at *183. The result is, accordingly, anomalous and may possibly be explained either by the court's uncertainty as to whether the throwing of the broom evidenced an attempt to strike the victim or by the court's lack of sympathy for the victim, a woman and possibly a prostitute.

²⁶ 4 BLACKSTONE, *supra* note 8, at *200.

²⁷ *Id.*

And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus if one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also if one gives a woman with child a medicine to procure abortion and it operates so violently as to kill the woman, this is murder in the person who gave it.

Id. at *200-01.

²⁸ *Id.* at *201.

broad evidentiary presumption: "For all homicide is presumed to be malicious, until the contrary appeareth upon evidence."²⁹

Applied literally, Blackstone's presumption would have reduced the law of murder to a series of special defenses to strict criminal liability for homicide, and the common law never adopted such an approach.³⁰ But this presumption revealed that Blackstone's principal concern was to elaborate the analytic process by which common law courts arrived at a conclusion of malice aforethought. By doing so, Blackstone articulated an essentially procedural and evidentiary dilemma with which

²⁹ *Id.* Blackstone claimed that this presumption shifted the burden of production of evidence, if not the ultimate burden of proof: "And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury" *Id.*; cf. *Phillips v. State*, 1999-KA-01276-SCT, ¶¶ 8-20, 794 So. 2d 1034, 1036-39 (Miss. 2001) (holding voluntary manslaughter instruction properly denied in murder trial in absence of defendant's testimony or other evidence supporting theory and finding malice may be inferred from use of deadly weapon).

³⁰ Blackstone's claim was challenged by nineteenth-century commentators. Cooley remarked: "As the majority of homicides are not, *in fact*, malicious, but occur through misadventure, or under circumstances which would reduce the offence to manslaughter, a legal presumption of malice seems inconsistent with the general doctrines of the criminal law, as well as with humanity." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *395 n.22 (Thomas M. Cooley ed., Chicago, Callahan & Co. 3d ed. 1884) (Cooley's comment).

Blackstone's successor as Vinerian lecturer likewise insisted:

That the destruction of life may amount to murder it must now be the effect of *malice aforethought*, *malitia praecogitata*. By malice in the legal sense is not meant any personal grudge, or private inalignity of one man against another, but *malus animus*, deliberate and habitual depravity, which may influence the action, whether it be done *irā*, *vel odio*, *vel causā lucri*. The general notion has been already settled by the exceptions from it: the privation of life neither by misfortune, nor by justice nor by necessity of self-defence, nor by the sudden violence of passion will be accounted murder.

1 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT THE UNIVERSITY OF OXFORD 1767-1773, at 402-03 (Thomas M. Curley ed., 1986).

Despite his acceptance of the negative definition of malice as unprovoked homicide, Chambers assumed that malice continued to require a real intent to kill. He discussed Hale's case where the defendant had thrown a broom at a woman and killed her after she insulted him. *See supra* note 25. Chambers concluded that this would be an easy case in his day: "I believe in the present state of opinions, both popular and juridical, no difficulty would have been raised. The provocation was sudden, the resentment petulant, and the consequence not intended." 1 CHAMBERS, *supra*, at 403-04.

common law jurisdictions continue to struggle: on the one hand, the law demands proof of a culpable mental state; on the other hand, the mental state must often be inferred from the act of killing.³¹ In response to this dilemma, statutes have occasionally criminalized homicides committed with certain instrumentalities,³² and cases have recognized a presumption of malice when certain weapons are used.³³

³¹ This paradox assumes constitutional dimensions in the United States because the Supreme Court has held that due process both requires states to prove all elements of an offense beyond a reasonable doubt (including mental elements) and prohibits states from shifting the burden of proof on such elements. *Francis v. Franklin*, 471 U.S. 307, 313 (1985); see U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”). As a result, even when a killer aimed a gun at a victim through a door and pulled the trigger causing death, when the killer is charged with a form of murder that includes the element of intent, the State must prove the killer’s intent and may neither direct the jury to find such intent from the resulting death nor employ jury instructions that include language like “presume” that may confuse the jury as to the proper burden of proof on the issue of intent. *Franklin*, 471 U.S. at 313 (“The Due Process Clause of the Fourteenth Amendment . . . prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.”).

³² Blackstone mentions an English statute:

But there is one species of manslaughter which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. 1, c. 8, when one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought.

4 BLACKSTONE, *supra* note 8, at *193.

³³ Use of a deadly weapon is sufficient evidence of malice or intent to kill. *Phillips*, ¶ 11, 794 So. 2d at 103 (“We have held that ‘malice, or deliberate design, may be inferred from use of a deadly weapon.’”) (quoting *Carter v. State*, 97-KA-00760-SCT, ¶ 21, 722 So. 2d 1258, 1263 (Miss. 1998)). Mississippi trial courts before the mid-twentieth century repeatedly gave an instruction that “malice is implied by law from the nature and character of the weapon used, and the deliberate use of a deadly weapon . . . is in law, evidence of malice.” *Criss v. State*, 30 So. 2d 613, 614 (Miss. 1947) (quoting instruction, observing that “we do not approve it,” but finding that it was not reversible error). The court’s failure to reverse would be questionable today under *Franklin*.

In *Smith v. State*, the defendant fired a pistol into a crowded room, killing a fifteen-year-old girl. 38 So. 2d 725, 725 (Miss. 1949). A jury convicted him of murder under a “deliberate design” instruction, and the court affirmed with the

Notwithstanding the multiple, indeterminate associations of malice aforethought in the nineteenth century,³⁴ academic authorities today tend to treat "malice" as terminology adopted by courts as a post hoc rationalization for punishing a variety of mental states as murder. For over a century scholars have reduced malice aforethought to four different mental states accompanying the conduct that results in death: 1) intent to kill, 2) intent to inflict serious bodily injury, 3) extremely reckless disregard for the value of human life, and 4) felony murder.³⁵

observation:

We are of the opinion that under the usual and customary indictment . . . wherein the crime of murder is charged, there is sufficient evidence in this record to warrant the jury in convicting the defendant of murder without regard to whether clause (a) ["deliberate design"] or (b) ["act eminently dangerous to others"] of the statute hereinabove quoted is the applicable one.

Smith, 38 So. 2d at 725-26. Affirming the conviction, the court concluded that use of the weapon established a presumption or implication of malice that warranted submitting the case to the jury on a theory of murder and that there was no reversible error in the deliberate design instruction. *Id.* at 726.

It is true that malice is an essential element of murder, but it was held in the case of *Criss v. State*, Miss., 30 So. 2d 613, that actual malice is not a necessary ingredient of murder. As a matter of law the element of malice is implied from the deliberate use of a deadly weapon. Cases are cited by appellant to the effect that where all of the facts are in evidence an instruction for the State that malice will be implied from the deliberate use of a deadly weapon is not proper. However, the State did not obtain such an instruction in the instant case. The Court, however, was entitled to consider the law on the question in determining whether or not the issue of murder should be submitted to the jury at all.

Id.; accord *Nicolaou v. State*, 612 So. 2d 1080, 1083 (Miss. 1992) (holding unexplained killing with deadly weapon sufficient evidence of murder). See generally Stanny Sanders, *The Work of the Mississippi Supreme Court—Criminal Law and Procedure*, 21 MISS. L.J. 10, 12 (1949) ("In other words, because of the presumption of malice attending the deliberate use of a deadly weapon, when a homicide results from such a use of such weapon, the issue of murder can be properly submitted to the jury, even though the state fails to produce any evidence of malice or motive and although all the facts and circumstances surrounding the homicide are in evidence, and the jury therefore cannot be instructed as to the aforementioned presumption").

³⁴ Echoing Blackstone, Chitty insisted that malice meant either ill will towards a particular victim or "an evil design in general." 2 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *720.

³⁵ DRESSLER, *supra* note 10, § 31 02[B][2], at 503.

Mississippi and other American jurisdictions inherited the common law conception of malice in the form it had taken in the eighteenth and nineteenth centuries. By that time malice had come to include unintended killings resulting from both aggressive acts towards individuals and from extremely reckless conduct more generally. In contrast, England in the last century abolished murder liability for unintended killings. In the 1950s, as part of a searching reexamination of criminal laws, the Royal Commission on Capital Punishment and law reform committees concluded that "persons ought not to be punished for consequences of their acts which they did not intend or foresee."³⁶ Felony murder was abolished in England in

"Malice" is a legal term of art with little connection to its non-legal meaning. As the term has developed, a person who kills another acts with the requisite "malice" if she possesses any one of four states of mind: (1) the intention to kill a human being; (2) the intention to inflict grievous bodily injury on another; (3) an extremely reckless disregard for the value of human life; or (4) the intention to commit a felony during the commission or attempted commission of which a death results.

Id. (footnotes omitted); see LAFAVE, *supra* note 10, § 7.1(a), at 655. "To sum up these various modern types of murder, they are: (1) intent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; (3) felony murder; (4) depraved heart murder." *Id.* Dressler and LaFave also recognize a possible fifth category, killings arising out of resistance to lawful arrests. DRESSLER, *supra* note 10, § 31.02[B][2], at 503 n.34; LAFAVE, *supra* note 10, § 7.1(a), at 655. Students are properly warned "not to invoke the terms 'malice' or 'malice aforethought' for any of their common-sense connotations; rather, 'malice' is a 'code word' encompassing the states of mind outlined above." JOHN KAPLAN ET AL., CRIMINAL LAW: CASES & MATERIALS 347 (4th ed. 2000).

"Malice aforethought" is a legal term of art in which the words are not used in their ordinary sense. . . . Positively, it requires that the defendant at the time of the homicide have one of the following states of mind: (1) An intent to kill . . . (2) An intent to commit "serious" or "grievous" bodily injury . . . (3) A wanton and reckless disregard of a very great risk of causing death or serious bodily injury . . . (4) Malice is also implied when the defendant or his accomplice commits a killing in the perpetration of certain felonies.

PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS & TEXT 163 (6th ed. 2000). See generally ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 26 (3d ed. 2000) (listing four kinds of killings as those that "courts have characterized as heinous enough for murder (and therefore with 'malice aforethought')") (emphasis added).

Stephen presented the history of malice as culminating in these black letter formulae that he enumerated in his treatise. 3 STEPHEN, *supra* note 11, at 80.

³⁶ REP. ROYAL COMM. ON CAP. PUNISHMENT, 1953, [Cmd.] 8809, at ¶ 76, *quot-*

1957.³⁷ The English courts ultimately restricted liability for unintended killings to situations where the defendant knew that death was a highly probable result; and they abandoned even that form of culpability for murder in 1985.³⁸ Today English law accepts only two culpable mental states for murder: "an intent to kill, or an intent to cause grievous bodily harm."³⁹

B. Non Common Law Jurisdictions

Jurisdictions outside the common law tradition are divided over whether to classify reprehensible, unintended killings among their most serious form of criminal homicide. A few countries explicitly make some form of extreme recklessness sufficient to establish liability for their most serious form of criminal homicide.⁴⁰ Most others rank unintended killings as a lower form of homicide.⁴¹

ed in ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 264 (1995). The Commission concluded that manslaughter was sufficient for unintended homicides. ASHWORTH, *supra*, at 264.

³⁷ English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 1 (Eng.). See generally LaFAVE, *supra* note 10, § 7.5, at 690.

³⁸ ASHWORTH, *supra* note 36, at 262 (discussing abandonment on grounds of uncertainty).

³⁹ *Id.* at 259. Intent to cause grievous bodily harm is shown by intent "to cause really serious injury . . . without any proof that the defendant intended, or even contemplated, the possibility that death would result." *Id.* at 260 (citing *Regina Respondent v. Cunningham*, [1982] A.C. 566 (1981)). See generally A.P. Simester, *Murder, Mens Rea, and the House of Lords—Again*, 115 L.Q. REV. 17 (1999) (discussing House of Lords opinion authoritatively rejecting foresight-of-substantial-risk-of-harm instruction in favor of instruction requiring virtual certainty of serious bodily injury).

⁴⁰ Scotland defines murder to include killings committed with "wicked recklessness." See generally ASHWORTH, *supra* note 36, at 262; G.H. GORDON, *CRIMINAL LAW OF SCOTLAND* 736-40 (2d ed. 1978).

⁴¹ France defines *meurtre* (murder) as the "willful killing of another," CODE PÉNAL [C. PÉN.] art. 221-1, in *THE FRENCH PENAL CODE OF 1994 AS AMENDED AS OF JANUARY 1, 1999*, at 94 (Edward A. Tomlinson trans., Fred B. Rothman & Co. 1999) [hereinafter FRENCH PENAL CODE], and adds that "[m]urder committed with premeditation is an assassination . . . punishable by felony imprisonment for life." *Id.* art. 221-3, in FRENCH PENAL CODE, *supra*, at 94. In contrast, causing death "by carelessness, imprudence, inattention, negligence, or the non-observance of an obligation of safety or prudence imposed by law or regulation" is "unintentional homicide." *Id.* art. 221-6[1], in FRENCH PENAL CODE, *supra*, at 96. "The key fea-

ture of the intention is that it is an intention to take life. It is not necessary that the victim be the person the murderer wanted to kill." JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 242 (1998). Under French law, *meurtre* liability can also be aggravated when it is committed during a serious crime and by the status of the victim; it is then punished comparable to assassination. Compare C. PÉN. arts. 221-2[1]-[2], 221-3[2], in FRENCH PENAL CODE, *supra*, at 94-95, with C. PÉN. art. 221-4[1]-[2], at 95 (allowing court to raise penalty in certain circumstances). Situation factors and the status of the victim cannot elevate unintentional homicide to *meurtre*. *Id.* art. 221-6, in FRENCH PENAL CODE, *supra*, at 96.

Dutch law provides that "[a] person who intentionally takes the life of another is guilty of manslaughter," and "[a] person who intentionally and with premeditation takes the life of another person is guilty of murder." Wetboek van Strafrecht [WvS] arts. 287, 289, in THE DUTCH PENAL CODE 199 (Louise Rayar & Stafford Wadsworth trans., Fred B. Rothman & Co. 1997). Manslaughter liability is aggravated and punished comparable to murder when committed during the commission of criminal offenses. *Id.* art. 288, in THE DUTCH PENAL CODE, *supra*, at 199. In contrast, "[a] person who by negligence or carelessness is responsible for the death of another [is guilty only of death ensuing as a result of negligence or carelessness and] is liable to a term of imprisonment or of detention of not more than nine months." *Id.* art. 307, in THE DUTCH PENAL CODE, *supra*, at 204.

German penal law similarly provides that homicide (*Totschlag*) requires intent to kill. For translations, see THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY 176 (Joseph J. Darby trans., Fred B. Rothman & Co. 1987), and THE GERMAN PENAL CODE OF 1871, at 113 (Gerhard O.W. Mueller & Thomas Buergethal trans., Fred B. Rothman & Co. 1961) (containing German Penal Code as amended through 1953). Homicide is aggravated to *Mord* (murder) when committed "from a lust to kill (*Mordlust*), to satisfy [the killer's] sex drive, from covetousness or other base motives; treacherously or cruelly or by means endangering the community or for the purpose of making possible or concealing the commission of another crime." Strafgesetzbuch [StGB] § 211, in THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY, *supra*, at 176.

By excluding extreme recklessness and intent to inflict serious injury from its most serious class of homicide crimes, Continental jurisprudence appears to depart radically from the common law. However, French courts have characterized facts as establishing an intent to kill that common law courts would probably find demonstrated either an intent to injure or extreme recklessness. BELL, *supra*, at 243 (summarizing French case resulting in *meurtre* liability where "the act of releasing a driverless and unlit lorry in the direction of a group of police officers with a stone jammed onto the accelerator is sufficient indication of an intention when it is clear the actor knew that the lorry would necessarily kill anyone in its path"). German law reaches a similar result:

Both Soviet and German law take an indirect intention (*dolus eventualis*) to be sufficient to constitute intentional killing. The technical definition of indirect intention is that if the actor engages in life-endangering behavior, his killing is intentional if he "reconciles himself" or "makes peace" with the likelihood of death. Thus, if the killing is committed with "manifest indifference to the value of human life," even conduct of minimal risk can qualify as intentional homicide. Thus if the suspect fires at a moving car with people in it and a passenger is hit by the bullet, his killing is likely

C. Mississippi Statutory Treatments of Murder

1. Mississippi Territory 1798-1817

Federal legislation establishing the Mississippi Territory (which comprised the land that would constitute the states of Alabama and Mississippi) provided that its government be "similar to that which is now exercised in the Territory northwest of the Ohio" except that slavery was not prohibited.⁴² The Northwest Ordinance had provided for a governor and three judges and had given the governor and a majority of the judges the power to "adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district."⁴³

The governor and judges of the Mississippi Territory began to adopt laws in January 1799.⁴⁴ The first laws published in 1799 to 1800, eventually known as *Sargent's Code*, contained criminal provisions dealing with treason, murder, manslaughter, arson, burglary, robbery, riots, perjury, larceny, forgery, fraud, mayhem, usurpation, and battery.⁴⁵

to be treated as intentional.

GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 325-26 (1978).

⁴² Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 (1790), reprinted in FREDERICK E. HOSEN, *UNFOLDING WESTWARD IN TREATY & LAND. LAND DOCUMENTS IN UNITED STATES HISTORY FROM THE APPALACHIANS TO THE PACIFIC, 1783-1934*, at 45 (1988). The Act made the territory south of the Ohio River one "district." *Id.*

⁴³ Northwest Ordinance of 1787, § 5, reprinted in U.S.C.A. CONST., ORGANIC LAWS 18 (West 1987). Such laws were subject to disapproval by Congress. *Id.*

⁴⁴ JOHN R. SKATES, *MISSISSIPPI: A BICENTENNIAL HISTORY* 57 (1979) Governor Winthrop Sargent, a federalist and former Secretary of the Northwest Territory, proved unpopular with the inhabitants of the Mississippi Territory. *Id.* at 56. Critics protested that his government made new laws rather than simply adopting statutes in force in one of the original states. See generally *id.* at 57, Michael H. Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99, 103-04 n 14 (1995).

⁴⁵ A Law Respecting Crimes and Punishments (Feb. 28, 1799), reprinted in SARGENT'S CODE: A COLLECTION OF THE ORIGINAL LAWS OF THE MISSISSIPPI TERRITORY ENACTED 1799-1800: BY GOVERNOR WINTHROP SARGENT AND THE TERRITORIAL JUDGES 11-18 (1939) [hereinafter SARGENT'S CODE]. Crimes were among the statutes adopted by Governor Sargent and Justices P. Bryan Bruin and Daniel Tilton on the first day they legislated for the Mississippi Territory. P.L. Rainwater, *Introduction to SARGENT'S CODE*, *supra*, at 11. The crimes were clearly derived

The code's definition of murder incorporated the common law requirement of malice aforethought: "If any person or persons, shall with malice aforethought, kill or slay another person, he, she or they so offending, shall be deemed guilty of murder, and upon conviction thereof, shall suffer the pains of

from some restatement of common law doctrines but do not closely follow the formulas of Blackstone. *Id.* The provisional government subsequently enacted criminal provisions to regulate slaves. A Law Providing for the Speedy Trial of Slaves (Oct. 30, 1800), *reprinted in* SARGENT'S CODE, *supra*, at 167-68; A Law for the Regulation of Slaves (Mar. 30, 1799), *reprinted in* SARGENT'S CODE, *supra*, at 44-48. Most crimes were punished by imprisonment, whipping, or fine, and legislation attempted to provide the necessary means. *See* A Law Directing the Building and Establishing of a Court House, Gaol, Pillory, Whipping Post and Stocks in Every County (Apr. 12, 1799), *reprinted in* SARGENT'S CODE, *supra*, at 88-90. For a critical account of Governor Sargent's conviction that more jails were needed in the Territory, see the redeemer historical account by ROBERT LOWRY & WILLIAM H. MCCARDLE, A HISTORY OF MISSISSIPPI FROM THE DISCOVERY OF THE GREAT RIVER TO THE DEATH OF JEFFERSON DAVIS 169 (Jackson, Miss., R.H. Henry & Co. 1891).

Governor Sargent was convinced of the need for imposing legal order in the Territory even before he arrived, characterizing inhabitants of the Territory as men of "refractory and turbulent spirit." Rainwater, *supra*, at ii (quoting letter from Governor Sargent to Secretary of State Pickering). Even before the arrival of the second judge made it possible to adopt legislation, the governor took emergency steps, citing "imperious Necessity," Letter from Governor Sargent to Secretary of State Timothy Pickering (Sept. 29, 1798), in 1 MISSISSIPPI TERRITORIAL ARCHIVES 1798-1803: EXECUTIVE JOURNALS OF GOVERNOR WINTHROP SARGENT & GOVERNOR WILLIAM CHARLES COLE CLAIBORNE 53 (Dunbar Rowland ed., 1905), to appoint conservators of the peace. The governor obviously assumed the Territory was subject to certain criminal laws prior to legislation, for he authorized the conservators to suppress riots and affrays, hold the publishers of treasonable and seditious language to account, and to arrest criminals and hold felons pending the establishment of territorial supreme court. *See generally* Rainwater, *supra*, at ii; Hoffheimer, *supra* note 44, at 107.

While the prosecution of common law crimes might have been within Congress's grant of common law jurisdiction to the territorial courts, the provisional territorial government of the governor and judges was limited by the act of Congress to "adopt[ing] and publish[ing]" positive laws of the original states. Rainwater, *supra*, at ii. The governor's critics protested that parts of *Sargent's Code*, not copied from existing state legislation, exceeded the governor's authority. *Id.* And they objected that the punishment of arson by forfeiture of property in the Territory violated the federal Constitution. *Id.* at iii; *cf.* U.S. CONST. art. III, § 3 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

Problems were aggravated by the lack of access to statutes of states and by the lack of legal training of the governor and judges. *See generally* Hoffheimer, *supra* note 44, at 103 n.14 (citing sources).

death.”⁴⁶ It did not further define “malice aforethought.” It appears, however, that the drafters did not assume that malice aforethought was automatically established by killings perpetrated during the commission of or attempt to commit felonies, for they separately provided for murder liability for deaths occurring during particularly violent forms of burglary⁴⁷ and robbery⁴⁸ but for no other crimes.

⁴⁶ A Law Respecting Crimes and Punishments, SARGENT'S CODE, *supra* note 45, at 11.

⁴⁷ *Id.* at 12. The code defined the structures more broadly than the common law but defined the specific intent requirement more narrowly:

If any person or persons, shall in the night season, break, open and enter, any dwelling house, store or vessel, in which any person or persons dwell or reside, within [*sic*] a view and intention, of stealing and purloining therefrom, he, she or they, so offending; shall be deemed guilty of burglary

Id. The punishments, whipping, fine, and imprisonment were increased if the criminals completed the theft and if they “shall commit, or attempt to commit, any personal abuse, force or violence, or shall be so armed with any dangerous weapon or weapons as clearly to indicate a violent intention.” *Id.* This last provision was followed immediately by the murder rule, which, in this context, thus makes clear that the drafters envisaged that the killers subject to the rule were killing while *intentionally* inflicting violence or employing dangerous weapons in the course of burglary.

And if the death of any innocent person should ensue, from the breaking, and entering any dwelling house, shop, store or vessel, as aforesaid: and in any of the instances aforesaid; the person or persons, so breaking and entering, shall be deemed guilty of wilful murder: and all persons aiding and assisting, in breaking and entering any dwelling house, shop, store or vessel as aforesaid, or in any of the crimes consequent thereupon, as before pointed out, shall be deemed principals.

Id. at 13.

⁴⁸ Unarmed robbery was punished like simple burglary. *Id.* But when accompanied by a more violent assault, the punishment was increased, and when the assault resulted in death, it was classified as murder:

Whoever shall commit such robbery, with personal abuse or violence, or be armed at the time, with any dangerous weapon or weapons, so as clearly to indicate an intention of violence, he, she or they, so offending, upon conviction thereof, shall moreover suffer as in the second instance of Burglary: and in case any person or persons, robbing or attempting to rob, as aforesaid, shall kill or slay, any person or persons, defending him, her or themselves, or others: or his, her or their property, against such robber or robbers, or person or persons attempting to rob, or in pursuing and endeavoring to apprehend, and secure such person or persons, so robbing or attempting to rob, he, she or they so offending, shall be

The first statutory definition of manslaughter likewise tracked the common law on involuntary manslaughter: "If any person or persons, shall wilfully kill or slay another person, without malice aforethought; he she or they so offending, shall be deemed guilty of manslaughter; and upon conviction thereof, shall be punished as at the common law, hath heretofore been used and accustomed."⁴⁹

By 1807 the Territory was operating with a territorial legislature, which adopted new criminal statutes that prohibited "wilful murder" without defining the elements of that offense.⁵⁰ Survivors of duels that resulted in death were also guilty of wilful murder.⁵¹ The difference between murder and manslaughter was widened in 1814 when a statute authorized juries to sentence persons convicted of manslaughter to no more than one year in prison and to impose a fine of no more than five hundred dollars.⁵²

deemed guilty of wilful murder; and all aiders and abettors, in any robbery, as aforesaid, and in any of the crimes consequent thereupon, as before pointed out, shall be deemed principals.

Id.

⁴⁹ *Id.* at 12. The code did, however, specify at least some circumstances that absolved the killer of all criminal liability:

[I]f any person in the just, and necessary defense of his own life, or the life of any other person, shall kill or slay, another person, attempting to rob or murder, in the field, or highway, or to break into a dwelling house, if he cannot with safety to himself, otherwise take the felon, or assailant, or bring him to justice, he shall be holden guiltless.

Id. at 11-12.

⁵⁰ Act of Feb. 10, 1807, § I, *reprinted in* STATUTES OF THE MISSISSIPPI TERRITORY 212 (1816) ("If any person or persons shall commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."). The common law recognized the crime of petit treason, essentially murder of a husband by a wife (not vice versa), of a master by a servant, or an ecclesiastical superior by an inferior, *see* 4 BLACKSTONE, *supra* note 8, at *203-*04, and made it indictable and punishable "as is directed in other kinds of wilful murder." Act of Feb. 10, 1807, § II, *reprinted in* STATUTES OF THE MISSISSIPPI TERRITORY, *supra*, at 212. The Act imposed the death penalty on accessories before the fact to wilful murder, rape, arson, robbery, and burglary. *Id.* § XII, at 213.

It incorporated all other common law offenses. *Id.* § XLV, at 221 ("Every other felony, misdemeanor, or offence whatsoever, not provided for by this or some other act of the general assembly, shall be punished as heretofore, by the common law.").

⁵¹ Act of Feb. 10, 1807, § XXXIX, at 219.

⁵² Act of December 24, 1814, § I, *reprinted in* STATUTES OF THE MISSISSIPPI

2. Early State Legislation 1817-1824

In 1817 Mississippi gained statehood, and in 1820 the state legislature adopted comprehensive criminal legislation that retained the death penalty for murder. The statute referred to the crime simply as "murder"⁵³ rather than "wilful murder." The legislature preserved the wide gap between the punishments for murder and manslaughter, prescribing that persons convicted of manslaughter be fined and branded on the hand with the letter M.⁵⁴

There was dissatisfaction with the state's criminal laws, because two years later the legislature enacted a series of additional homicide statutes. Poison was a particular concern, and principals and aiders and abettors who committed "wilful killing by poisoning" were made guilty of "wilful murder."⁵⁵ Fol-

TERRITORY, *supra* note 50, at 244: "Hereafter, any person who shall commit the crime of manslaughter, and be thereof convicted, such person shall be fined in a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months [at the jury's discretion.]" *Id.*

⁵³ The act consolidated previous sections punishing principals and accessories before the fact and removed "wilful" from the characterization of murder. Act of Feb. 12, 1820, ch. 56, § 2, 1820 Miss. Laws 3d Sess. 67, 67. "That very person who shall commit murder, or shall aid, abet, counsel, hire, command, cause or procure an person or persons to commit murder, shall, on being thereof convicted, suffer death." *Id.* It continued to provide that petit treason be indicted and punished like murder. *Id.* § 3, at 67-68. In addition, it copied verbatim the provision from 1807 territorial legislation providing that the survivor of a duel be guilty of "wilful murder." *Id.* § 38, at 78.

⁵⁴ *Id.* § 4, at 68. "That if any person or persons commit the crime of manslaughter, and be thereof convicted, such person or persons shall be fined in such sum, as shall be assessed by the court, and branded on the hand with the letter M, in open court." *Id.* Both the change of discretionary authority to impose a fine for manslaughter from the jury to the court and the mandatory requirement of branding may evidence the legislature's dissatisfaction with the results of jury decisionmaking. The reasons for the removal of any authority to imprison is problematic and may have been a mistake. See *infra* text accompanying note 61.

⁵⁵ REV. CODE MISS. ch. 56, § 1 (1824) (concerning the crimes of poisoning and stabbing and their respective punishments).

It is questionable whether this statute responded to a practical gap in the murder laws. It seems designed rather to alleviate a concern that might have been provoked by Blackstone's discussion of implied malice. Blackstone viewed killing by poison as "the most detestable," 4 BLACKSTONE, *supra* note 8, at *196, nevertheless, he believed that willful poisoning did not necessarily show express

lowing an old English statute,⁵⁶ unprovoked stabbing-killings were made wilful murder.⁵⁷ Survivors of fatal duels and aiders and abettors were guilty of murder.⁵⁸ The courts early assumed that legislative references to "murder" imported the common law element of malice aforethought.⁵⁹

Legislation in 1822 restated verbatim the existing murder statute.⁶⁰ But lawmakers now thought branding was insufficient punishment for manslaughter, for while they copied most of the 1820 manslaughter statute, they added authority for the trial judge to impose a prison sentence at his discretion.⁶¹

malice. *Id.* at *200. This, according to the theory set forth above, *see supra* text accompanying notes 17-18, was because conclusive evidence of poisoning with intent to kill might exist without further evidence of longstanding or notorious hostility. 4 BLACKSTONE, *supra* note 8, at *200. But Blackstone insisted this was an easy case where the law presumed malice. *Id.* The addition of this statute may have resulted from a legislator misunderstanding Blackstone and concluding that the problem of classifying deliberate poisoning killings as evidencing *express* malice suggested a difficulty in classifying them as murder.

⁵⁶ See Blackstone's discussion of this statute, *supra* note 32. Under English law these killings were not in fact classified as murder (as there was not necessarily malice aforethought), but by withdrawing benefit of clergy, they were punished the same as murder.

⁵⁷ The Mississippi statute incorporated the elements and some of the language of the English model. REV. CODE MISS. ch. 56, § 2 (1824) (stabbing any person "that hath not then any weapon drawn" nor struck the first blow who died within six months "although it cannot be proved that the same was done of malice aforethought . . . shall be . . . wilful murder"). This statute, dated June 11, 1822, expressly incorporated defenses of self-defense and misfortune that were made general defenses to homicide in the more comprehensive code, dated June 14, 1822. *See id.* ch. 54, § 29.

This statute and the one addressing homicide by perjury, *infra* note 67, betray the influence of Blackstone. Friedman remarked of contemporary courtroom practice: "The poverty of source materials left a vacuum, filled in by Blackstone, local statutes, and native wit. Few lawyers could know how to distinguish the fossils in Blackstone from the living law back East. For this reason, court law was, simultaneously, freewheeling and curiously archaic." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 145 (2d ed. 1985). Mississippi positive laws from this period suggest that Friedman's remarks apply also to the legislative use of Blackstone.

⁵⁸ REV. CODE MISS. ch. 55, § 1 (1824).

⁵⁹ *See* State v. Jones, 1 Miss. (1 Walker) 83, 85 (1820) ("The taking away the life of a reasonable creature, under the king's peace, with malice aforethought, express or implied is murder at common law.").

⁶⁰ REV. CODE MISS. ch. 54, § 2 (1824). The Act also copied verbatim the 1820 statute making petit treason murder. *Id.* § 3.

⁶¹ *Id.* § 4.

Moreover, in a separate statute they provided that persons who committed manslaughter a second time were to be sentenced to death.⁶² Responding to a problem raised in common law treatises,⁶³ they provided that perjury committed with the purpose of causing death should be treated as murder when death resulted.⁶⁴ Lawmakers also enacted defenses requiring a special verdict for specific types of excusable homicide encompassing self defense and misfortune⁶⁵ and for types of justifiable homicide encompassing law enforcement, defense of others, and lawfully chastising a child or servant.⁶⁶

If any person or persons shall commit the crime of manslaughter, and be thereof convicted, such person or persons shall be fined in such sum, and imprisoned, for such length of time, as shall be adjudged by the court, and branded in the hand with the letter M, in open court.

Id.

⁶² *Id.* § 68. "[I]f any person or persons shall be convicted a second time of the crime of manslaughter, the person or persons so offending, shall suffer death." *Id.* At common law, benefit of clergy was available only for the first conviction of manslaughter. Accordingly, manslaughter might have been a capital crime under the vague provisions of *Sargent's Code*, but subsequent legislation had provided more specific forms of punishment that did not incorporate the common law.

⁶³ See 4 BLACKSTONE, *supra* note 8, at *196 ("There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed."). Blackstone suggested that such cases met the elements of murder but were not prosecuted in order not to deter witnesses in capital cases. *Id.* at *196 n.g., *197.

⁶⁴ REV. CODE MISS. ch. 54, § 59 (1824). "If any person bear false witness wilfully, and of purpose to take away anyone's life, and the life of any person be taken away in consequence of such false witness; the person so offending, on conviction thereof . . . shall suffer death." *Id.*

⁶⁵ *Id.* § 29. This is the predecessor of MISS. CODE ANN. § 97-3-17 (2000) (defining excusable homicide). See *infra* text accompanying notes 74-79.

⁶⁶ REV. CODE MISS. ch. 54, § 30. This is the predecessor of MISS. CODE ANN. § 97-3-15 (2000) (defining justifiable homicide). See *infra* text accompanying notes 74-79.

There was no statutory privilege of a husband to employ force against his wife, and the Mississippi Supreme Court early held that a husband was not immune to a criminal prosecution for assault and battery against his wife. *Bradley v. State*, 1 Miss. (1 Walker) 156, 157-58 (1824). The court nevertheless insisted in dictum that a husband had a privilege "within reasonable bounds . . . to inflict pain and suffering" on his wife. *Bradley*, 1 Miss. at 158. The court specifically referred to the doctrine that a husband might "use a whip or rattan, no bigger

3. The Penitentiary Code of 1839: Roots of Current Homicide Statutes

In 1839 the legislature enacted a new criminal code.⁶⁷ Running nearly one hundred pages in the session laws, the topics included criminal procedure, rights of defendants, substantive criminal law, and rules and regulations for the penitentiary. Crimes were organized under seven titles according to the type and seriousness of offenses:

- Crimes punishable by death
- Offenses against persons punished as felonies
- Offenses against property punished as felonies
- Offenses affecting the administration of justice punished as felonies
- Offenses against the right of suffrage
- Offenses against public peace and morals punished as felonies
- Offenses punished by jail sentence or fine

Although the preamble explained that the purpose of the legislation was to consolidate, simplify, amplify, and rearrange existing criminal statutes,⁶⁸ the new penal code effected the most radical revision of Mississippi criminal law in the state's history.

Copied from the New York Code of 1829,⁶⁹ the Mississippi

than my thumb, in order to inforce [sic] the salutary restraints of domestic discipline." *Id.* at 157. The historical authenticity of this common law privilege of wife beating was denied by conservative anti-feminists because some feminists incorrectly associated this privilege with the etymology of the phrase "rule of thumb." An internet search, performed from <http://www.google.com>, of "rule of thumb feminism" will reveal numerous references.

⁶⁷ Act of Feb. 15, 1839, ch. 66, 1839 Miss. Laws 102. The formal title of this session law was, "An Act to Amend the Acts of This State Concerning Crimes and Punishments, and the Penitentiary." As codified, this act was given the title Penitentiary Code. See STAT. MISS. ch. 50 (V.E. Howard & A. Hutchinson 1840) [hereinafter PENITENTIARY CODE].

⁶⁸ PENITENTIARY CODE, *supra* note 67, pmbl. ("Whereas, it is expedient that the several statutes of this state relating to crimes and punishments, proceedings in criminal cases, and prison discipline, should be consolidated and arranged in appropriate acts, titles and articles, that the language thereof should be simplified, and that omissions and other defects should be supplied . . .").

⁶⁹ Most of the language for the homicide statutes was copied verbatim from

Penal Code of 1839 reflected a new conceptual approach that valued rules of general application. The code thus removed special provisions for stabbing and poisoning, declaring: "The killing of a human being, without the authority of law, by poisoning, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case."⁷⁰ Where older statutes had referred simply to the crime of murder, the new code provided working definitions of the elements of offenses and sought to avoid technical terminology. The code eliminated the word "malice" from definitions of both murder and manslaughter.⁷¹ This yielded a new formula-

contemporaneous New York penal laws. See 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 1-2 (1836); 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 1-2 (1829). Missouri also copied the New York criminal code but followed the Pennsylvania practice of differentiating between first and second degrees of murder. REV. STAT. MO. Crimes and Punishments, art. 11, § 1 (2d ed. 1840); cf. *Plummer v. State*, 6 Mo. 231, 241 (1840) (quoting involuntary homicide statute similar to Mississippi's). The New York model was later copied by other states. See *infra* text accompanying notes 484-85.

⁷⁰ PENITENTIARY CODE, *supra* note 67, tit. 2, § 3 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 1, § 4 (1829)).

Petit treason, as before, was explicitly abolished (though not by name as it was in the caption provided by New York reviser). See *id.* tit. 1, § 7 ("The killing of a master by his servant, or of a husband by his wife, shall not be deemed any other or higher offence than if committed by any other person."). The text of the statute is copied from 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 1, § 8 (1829).

⁷¹ New York and Mississippi were hardly the first to eliminate "malice" from definitions of homicide, and the language of "premeditation" and "deliberation" were influenced by the definition of murder in colonial Pennsylvania. William Penn, probably influenced by George Fox's writings against capital punishment, defined murder as homicide done "wilfully or premeditately [sic]." Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 760-61 (1949) (tracing history of murder statute since colonial times). In 1793, the state of Pennsylvania adopted the definition of first degree murder as "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing." *Id.* at 773 (quoting 4 JOURNAL OF THE SENATE 80 (Pa. 1794)).

The Pennsylvania model was very influential, and New York amended its murder statute later in the century to distinguish first degree and second degree murder. First degree murder then included intentional killings only when done from a "deliberate and premeditated design to effect the death of the person killed, or of any human being." 3 REV. STAT. N.Y. pt. 4, ch. 1, tit. 1, § 5 (1875). Second degree murder encompassed killings committed "intentionally but without deliberation and premeditation." *Id.* Because the legislature focused exclusively on premeditation and deliberation in differentiating degrees of murder, unintentional

tion for murder that has been retained with modifications down to the present:

Such killing, unless it be manslaughter or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases:

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being;
2. When perpetrated by an act eminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual;
3. When perpetrated, without any design to effect death, by a person engaged in the commission of a felony.⁷²

The first section was probably designed to cover cases of express malice. The second section covered cases of implied malice. The third section codified the doctrine of felony murder. The statute's broad definitions eliminated the need for additional statutes declaring killings by dueling to be murder, though a possible jurisdictional defense was removed by providing that it was murder for a resident to agree to fight a duel

homicides were still ranked as first degree murder. The higher culpability attached to such killings by legislation probably helps explain the emergence of authority in the nineteenth century that required a depraved heart killer to create a risk of death to more than one person. This authority influenced Mississippi decisions for some time. See *infra* note 281.

⁷² PENITENTIARY CODE, *supra* note 67, tit. 2, § 4; cf. MISS. CODE ANN. § 97-3-19 (2000):

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony [other than the felonies listed for capital murder].

Id. The original statute followed the New York statute verbatim except that it substituted "eminently" for "imminently." See 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 1, § 5(2) (1829).

out of state when the victim died in Mississippi.⁷³

The Penal Code of 1839 amplified previous efforts to define the residual categories of homicide. Any killing by "act, procurement, or omission" that did not qualify as murder was "either justifiable or excusable homicide, or manslaughter."⁷⁴ Justifiable homicide was defined to include public acts of law enforcement.⁷⁵ Justifiable homicide also extended to acts of private persons resisting murders or felonies,⁷⁶ defending themselves and certain third persons,⁷⁷ and arresting felons,

⁷³ PENITENTIARY CODE, *supra* note 67, tit. 2, § 5 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 1, § 6 (1829)). This statute, as later amended to apply to all persons, not only residents, who agreed in the state to fight a duel outside the state, is retained as MISS. CODE ANN. § 97-3-23 (2000).

⁷⁴ PENITENTIARY CODE, *supra* note 67, tit. 3, § 1 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 1 (1829)).

⁷⁵ *Id.* § 2:

Such homicide is justifiable when committed by public officers and those acting by their command, in their aid and assistance, either

1. In obedience to any judgement of a competent court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty; or,
3. When necessarily committed in re-taking felons who have been rescued, or who have escaped; or,
4. When necessarily committed in arresting felons fleeing from justice.

Id. This copied 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 2 (1829). These defenses are retained with slight rephrasing in the current laws. MISS. CODE ANN. § 97-3-15(1)(a)-(d).

⁷⁶ There is obviously much duplication in the list of circumstances establishing a defense of justification. The code separately listed situations applicable to public officers and their agents and then listed those that applied to all persons. "Such homicide is also justifiable when committed by any person in either of the following cases: 1. When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling-house in which such person shall be" PENITENTIARY CODE, *supra* note 67, tit. 3, § 3 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 3(1) (1829)). The current laws retain this with slight rephrasing. MISS. CODE ANN. § 97-3-15(1)(c).

⁷⁷ Homicide is justifiable:

[w]hen committed in the lawful defence of such person, or of his or her husband, wife, parent, child, master, mistress, or servant, when there shall be a reasonable ground to apprehend design to commit a felony, or to do some great person injury, and there shall be imminent danger of such design being accomplished

PENITENTIARY CODE, *supra* note 67, tit. 3, § 3(2) (copying 2 REV. STAT. N.Y. pt. 4,

suppressing riots, and keeping the peace.⁷⁸

Excusable homicide included two categories. The first, corresponding to the common law defense of accident and misfortune, applied where death resulted unintentionally from lawful acts.⁷⁹ The second applied to provoked, heat-of-passion killings and to affrays or sudden combats.⁸⁰ This second cate-

ch. 1, tit. 2, art. 1, § 3(2) (1829)). The current law extends the privilege to defend others "to any other human being," a change introduced in 1856. MISS. CODE ANN. § 97-3-15(f); see REV. CODE MISS. ch. 64, § 34, art. 168 (1857).

⁷⁸ Homicide is justifiable "[w]hen necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace." PENITENTIARY CODE, *supra* note 67, tit. 3, § 3(3) (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 3(3) (1829)). These are retained with slight rephrasing. MISS. CODE ANN. § 97-3-15(g)-(h).

⁷⁹ PENITENTIARY CODE, *supra* note 67, tit. 3, § 4(1) ("Such homicide is excusable when committed— 1. By accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent . . .") (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 4(1) (1829)).

The special references to correcting children and servants was removed in 1985. See Act of March 21, 1985, ch. 380, § 1, 1985 Miss. Laws 138, 138. The general defense is preserved. See MISS. CODE ANN. § 97-3-17 ("The killing of any human being by the act, procurement, or omission of another shall be excusable: (a) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent . . .").

Common law authorities were fascinated by cases where physical pain and injuries, permitted for the purpose of disciplining servants and children, resulted in unintended death. "If the master designeth moderate correction to his servant, and accordingly useth it, and the servant by some misfortune dieth thereof, this is not murder, but *per infortunium*, because the law alloweth him to use moderate correction, and therefore the deliberate purpose thereof is no *ex malitā praecogitatā*." 1 HALE, *supra* note 12, at 454. Hale maintained that immoderate or unreasonable correction might be murder "if done with deliberation and design" or manslaughter "if done hastily, passionately, and without deliberation." *Id.* For Blackstone, however, express malice was demonstrated by the very fact of "excessive correction." See 4 BLACKSTONE, *supra* note 8, at *199 (citing cases of murder where the victim was dragged by a horse, struck with an iron bar, and stamped in the belly).

It is not clear to me whether the authorities were concerned with a practical problem of allocating spheres of permissible injury or whether the issue attracted their attention because it threatened to challenge the absolute character of the presumption of malice from an intent to inflict serious injury. It is obvious, however, that slaveholders and their agents who depended on the frequent administration of severe injuries would want a liberal defense for homicide resulting from correcting a servant.

⁸⁰ PENITENTIARY CODE, *supra* note 67, tit. 3, § 4(3) ("Such homicide is excus-

gory effected a radical, and perhaps unintended, change from the common law that may have resulted from a misreading of Blackstone. In discussing express malice, Blackstone had written that "if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice."⁸¹ Blackstone meant to explain that a particularly heinous method of killing in response to provocation could display sufficient evil motive to qualify as malice. This explanation was necessary because at common law, absent such malice, the unlawful killing would be manslaughter, not excusable homicide. It is possible the drafters, reading Blackstone's explanation in isolation, may have misunderstood him to require such a cruel and unusual method of killing for homicide liability in general. Conversely, they may have misunderstood him to imply that the absence of such methods constituted excusable homicide.

Perhaps, however, the original drafters in New York just thought the common law rule was too harsh. In any event, they generously extended excusable homicide to hot-blooded provoked and sudden combat killings but only when no undue advantage was taken, no dangerous weapon was used, and no

able when committed . . . [b]y accident and misfortune, in heat of passion, upon any sudden and sufficient provocation, or upon any sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.") (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 4(2) (1829)). See *infra* text at note 222 (discussing relationship between excusable homicide and voluntary manslaughter).

The current laws retain this defense, but the recodification of this defense over the years resulted in a separate enumeration of provoked and sudden combat killings. Cf. MISS. CODE ANN. § 97-3-17 (making homicide excusable "(b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation; (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner"). Under this formulation, the special qualifications of no undue advantage, no dangerous weapon, and no cruel and unusual manner were restricted to sudden-combat killings. In the original, however, these appear to be more general restrictions for all such excusable homicides, and their absence would presumably have resulted in the homicide being treated as manslaughter (as it would have been at common law).

⁸¹ 4 BLACKSTONE, *supra* note 8, at *199.

cruel or unusual manner was employed. These requirements for excuse in turn led to the addition of two special forms of voluntary manslaughter. The first required a "cruel and unusual" manner of killing: "The killing of a human being, without a design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree."⁸² The second required a dangerous weapon: "The killing of another, in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree."⁸³ The common requirement of both forms of manslaughter, that the killing be "without a design to effect death," was ambiguous. The absence of design might have signified merely that the killer did not have to have a general intent to kill.⁸⁴ But more likely, it meant the absence of a specific intent to kill in cold blood or with deliberation, because killings with "premeditated design" were defined as murder. In other words, premeditated design and "heat of passion" were originally understood as mutually exclusive.⁸⁵

While all killings with premeditated design were murder, heat-of-passion and sudden combat killings were graded according to the method of death or the instrumentality employed.

⁸² PENITENTIARY CODE, *supra* note 67, tit. 3, § 10 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 15 (1829)). Heat of passion killings that were neither cruel nor unusual but that did not qualify as excusable homicide were fourth degree manslaughter. See *infra* text accompanying note 198.

⁸³ *Id.* § 12 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 17 (1829)). The two statutes were subsequently consolidated and are retained as MISS. CODE ANN. § 97-3-35 ("The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter.").

⁸⁴ This may have been the legislature's objective when it substituted "without malice" for "without design." See *supra* note 72 and accompanying text.

⁸⁵ Though this is the most obvious conclusion from the wording and structure of the statute, the supreme court insisted on construing the old terminology "premeditated design" as meaning no more than malice at common law. See *McDaniel v. State*, 16 Miss. (8 S. & M.) 401 (1847).

When they occurred with neither undue advantage, nor weapon, nor in cruel or unusual manner, they were excused. When they were not excusable but occurred without a weapon by means neither cruel nor unusual, they were fourth degree manslaughter, punished by imprisonment up to two years. When they occurred in a cruel and unusual manner, they were second degree manslaughter, punished by imprisonment from four to seven years. When they occurred with a dangerous weapon, they were third degree manslaughter, punished by imprisonment from two to four years.⁸⁶

The Penal Code of 1839 added other forms of manslaughter. Particularly confusing was the form of manslaughter committed during a crime or misdemeanor:

The killing of a human being, without a design to effect death, by the act, procurement, or culpable negligence, of any other, while such other is engaged—

1. In the perpetration of any crime or misdemeanor not amounting to felony: or,

2. In the attempt to perpetrate any crime or misdemeanor,

—in cases where such killing would be murder at common law, shall be deemed manslaughter in the first degree.⁸⁷

This seemed on its face to codify misdemeanor-manslaughter. Indeed, New York courts so construed the New York model for this statute.⁸⁸ Nevertheless, perhaps because the statute ap-

⁸⁶ PENITENTIARY CODE, *supra* note 67, tit. 3, § 20 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 20 (1829)); see 2 CHITTY, *supra* note 34, at *731 (maintaining that killing where "no undue advantage" was taken was manslaughter); 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES & INDICTABLE MISDEMEANORS *495 (observing that it was murder where undue advantage was taken during mutual combat). The New York statute modified the law by reducing the former case to excusable homicide and the latter to manslaughter.

⁸⁷ PENITENTIARY CODE, *supra* note 67, tit. 3, § 6 (codified as amended at MISS. CODE ANN. § 97-3-29 (changing "any other" to "another")). First degree manslaughter was punished by imprisonment "for a term not less than seven years." *Id.* § 20(1).

⁸⁸ *People v. Rector*, 19 Wend. 569, 607-08 (N.Y. Sup. Ct. 1838) (construing New York statute to impose manslaughter liability on persons who killed accidentally while committing misdemeanor); cf. 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 421 (Boston, Little, Brown & Co. 1858) (observing that

peared to mitigate what would have been murder liability,⁸⁹ the statute was read to impose liability for killings of, rather than by, misdemeanants.⁹⁰ On the one hand, this interpretation may have resulted from careless reading of a poorly drafted statute. On the other hand, it may have actually expressed the legislature's purpose. The deliberate killing of innocent victims was murder, and the deliberate killing of felons was justifiable homicide under certain circumstances. So the drafters may have meant to fill a gap between the killing of innocent victims and felons by classifying the killing of persons committing misdemeanors and attempts as manslaughter. A similar construction was given to another statute that imposed manslaughter liability on trespassers who "involuntarily" killed, and the language of this statute was later altered to impose liability on the killing of trespassers.⁹¹ Over time, the manslaughter statute prohibiting killings by (or of) misdemeanants metamorphosed into today's misdemeanor manslaughter statute.⁹²

elements of murder under New York statute reduced certain crimes that would have been murder at common law to manslaughter).

⁸⁹ Killings without design by misdemeanants would not have been murder at common law. On the other hand, the killing of such a misdemeanor might have been murder at common law when committed without premeditation yet with malice because there was no privilege to employ deadly force to apprehend or stop a misdemeanor. The statute's requirement that the killing be "without design" is troubling. It may have meant that no general intent needed to be proved, but it is more likely that it meant that a killing with design (or "premeditated design") would qualify as murder.

⁹⁰ See *infra* note 92.

⁹¹ PENITENTIARY CODE, *supra* note 67, tit. 3, § 13 ("The involuntary killing of a human being, by the act, procurement, or culpable negligence, of another, while such other person is engaged in the commission of a trespass or other injury to private rights or property, or engaged in an attempt to commit such injury, shall be deemed manslaughter in the third degree.") (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 18 (1829)). This is retained in current laws with a change that makes explicit that the victim, not the killer, is the trespasser. MISS. CODE ANN. § 97-3-33 ("The involuntary killing of a human being . . . while such human being is engaged in the commission of a trespass or other injury to private rights or property, or is engaged in an attempt to commit such injury, shall be manslaughter.").

⁹² MISS. CODE ANN. § 97-3-29 ("The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to felo-

The most likely explanation, and the simplest, is that the legislature originally meant to criminalize culpable negligence

ny, or in the attempt to commit any crime or misdemeanor, where such killing would be murder at common law, shall be manslaughter."). Captions in early codes declared the statute applied to misdemeanor-victims, *cf.* MISS. CODE ch. 20, § 991 (1930) ("[H]omicide—killing while the slain was committing a misdemeanor"), but a supreme court decision, *State v. Proctor*, 59 So. 890 (1912), was eventually read as providing some authority for construing it as embodying the doctrine of misdemeanor manslaughter. In that case, the supreme court affirmed a trial court's refusal to give felony murder instructions where a mother died from an illegal abortion but maintained that "[t]he crime which defendant intended . . . would be manslaughter [citing the section pertaining to killing of quick child]." *Proctor*, 59 So. at 891. The court then inexplicably concluded that "[s]ection 1233 [killing while such other engaged in misdemeanor] was intended to meet such cases." *Id.* Since killing an unborn, quick child was a felony and not a misdemeanor, the court's decision may have meant to cite former section 1232 (precursor of today's statute, MISS. CODE ANN. § 97-3-27 (2000)), understood as imposing liability for felony manslaughter.

The court subsequently held squarely that an unintentional death caused during the commission of three misdemeanors was not murder. *See* *Dixon v. State*, 61 So. 423, 424 (1913) (holding that unlawful discharge of gun resulting in death was not misdemeanor manslaughter where misdemeanors were *mala prohibita* not *mala in se* and where death was not the natural and probable result of the misdemeanors).

The (inept) annotation of *Dixon* and the generous construction of the dictum in *Proctor* apparently led the editors to re-designate the statute. *See* MISS. CODE ANN. § 11-1-2221 (1942) ("[H]omicide—killing while the slayer was committing misdemeanor").

Today's code continues to designate this statute as a misdemeanor manslaughter provision. *Cf.* MISS. CODE ANN. § 97-3-19 (2000) ("Homicide; killing while committing a misdemeanor"). Headings in the code are not law. *See* *Mayfield v. State*, 612 So. 2d 1120, 1131 (Miss. 1992) (Banks, J., concurring in part and dissenting in part) (cautioning that title of statute is work of codifiers, not legislature, and should not be controlling in construction). The redesignation of this statute as a misdemeanor manslaughter statute has apparently never been challenged and has been embraced by prosecutors and courts. *Cf.* *Jones v. State*, 678 So. 2d 707, 710 (Miss. 1996) (en banc) (reversing on evidentiary grounds but holding that child's death from ingestion of cocaine supported finding of culpable negligence in prosecution for manslaughter while engaged in criminal abuse or neglect).

The misdemeanor manslaughter construction was adopted in older model jury instructions. *See* MISS. CIR. CT. JUDGE'S ASS'N & THE MISS. JUDICIAL COLL., UNIV. OF MISS. LAW CTR., MISSISSIPPI MODEL JURY INSTRUCTIONS: CIVIL AND CRIMINAL No. 114.09 (1977). For years, however, the instruction pertaining to section 97-3-29 has erroneously duplicated the text for the preceding instruction. *Compare* MISS. JUDICIAL COLL., MISSISSIPPI MODEL JURY INSTRUCTIONS: CRIMINAL § 8:9 (2001) [hereinafter MODEL JURY INSTRUCTIONS], *with id.* § 8.10.

manslaughters committed during misdemeanors and trespasses. It enacted separate statutes for those killings in order to punish them more severely. (They ranked as first and third degree manslaughter). But according to this explanation, the statutes became redundant when degrees of manslaughter were eliminated in 1857⁹³ as all killings with culpable negligence were already manslaughter. Nevertheless, the statutes were not repealed, and unwary prosecutors stumbled over them, and courts, revisers, and legislators searched them assuming there was some reason for their existence.

The 1839 Code also provided that the killing of a felon was manslaughter under certain circumstances.⁹⁴ At common law, a person who killed an assailant, but who was the initial aggressor or employed unreasonable or unnecessary force in self defense, was not entitled to a defense of excusable homicide; however, his or her criminal liability was mitigated to manslaughter under the theory of imperfect self defense.⁹⁵ The 1839 Code offered a comparable mitigation to those who killed a felon where the homicide was not excusable—such as when the killing was not necessary or when the victim had ceased committing or attempting to commit the felony.⁹⁶

Other manslaughter statutes criminalized assisted suicide,⁹⁷ killing unborn quick children,⁹⁸ and willfully allowing

⁹³ See *infra* note 120 and accompanying text.

⁹⁴ PENITENTIARY CODE, *supra* note 67, tit. 3, § 11.

⁹⁵ See generally 4 BLACKSTONE, *supra* note 8, at *191 (classifying unnecessary self defense as manslaughter because the provocation negates any inference of "previous malice"); LAFAVE, *supra* note 10, § 7.11(a), at 718-19.

⁹⁶ "Every person who shall unnecessarily kill another, either[:] 1. While resisting an attempt by such other person to commit any felony, or to do any other unlawful act: or, 2. After such attempt shall have failed, [—]shall be deemed guilty of manslaughter in the second degree." PENITENTIARY CODE, *supra* note 67, tit. 3, § 11 (1840) (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 16 (1829)). This is retained in current laws. See MISS. CODE ANN. § 97-3-31 ("Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter."). See generally Wells v. State, 305 So. 2d 333, 336 (Miss. 1974) (discussing evolution of court's construction of this statute).

LaFave observes that other common law jurisdictions reached a similar result as a result of case law. LAFAVE, *supra* note 10, § 7.11(b), at 719 n.11 (citing cases).

⁹⁷ PENITENTIARY CODE, *supra* note 67, tit. 3, § 7 ("Every person deliberately

dangerous animals to go at large with knowledge of their dangerous propensities.⁹⁹

Shipping disasters motivated a manslaughter statute that criminalized wilfully or negligently overloading boats for profit.¹⁰⁰ The horrors of steamboat explosions led to manslaughter liability for captains, pilots, and engineers of steamboats who caused death by allowing too much pressure in boilers from ignorance or neglect or for the purpose of racing another boat.¹⁰¹ Deaths caused by drunken physicians were also pun-

assisting another in the commission of self-murder, shall be deemed guilty of manslaughter in the first degree.") (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 7 (1829)). Assisting suicide today is a separate felony from manslaughter and consists of assisting another to take his or her life, taking another's life, or attempting to take another's life. MISS. CODE ANN. § 97-3-49. Prohibited conduct includes advising, encouraging, abetting, or assisting. *Id.*

⁹⁸ Quickening denotes the point during gestation at which motion is detected, usually about halfway through pregnancy. See BLACK'S LAW DICTIONARY 1261 (7th ed. 1999). Fetuses before quickening were not protected; indeed the state would execute a pregnant woman unless a jury of physicians determined that quickening had occurred. See PENITENTIARY CODE, *supra* note 67, tit. 2, §§ 19-21 (discussing execution of pregnant females) (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, §§ 20-22 (1829)). But two separate statutes punished the killing of unborn quick children. The first punished as first degree manslaughter the wilful killing of an unborn quick child by injury to the mother that would have been murder if it had resulted in the death of the mother. *Id.* tit. 3, § 8 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 8 (1829)). This is preserved verbatim in MISS. CODE ANN. § 97-3-37(1). The second punished as second degree manslaughter abortions of unborn quick children unless necessary to save the life of the mother or unless advised by two physicians as necessary to save the life of the mother. PENITENTIARY CODE, *supra* note 67, tit. 3, § 9 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 9 (1829)). This second statute is unconstitutional as applied to voluntary, lawful abortions prior to viability. *Roe v. Wade*, 410 U.S. 113, 147-66 (1973) (holding unconstitutional statutes prohibiting abortion prior to viability). It has been repealed and replaced by legislation. See *infra* text accompanying notes 175-81 (discussing its repeal); MISS. CODE ANN. § 97-3-37(1).

⁹⁹ PENITENTIARY CODE, *supra* note 67, tit. 3, § 14 (establishing such acts as third degree manslaughter) (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 14 (1829)) (codified as amended at MISS. CODE ANN. § 97-3-45).

¹⁰⁰ *Id.* tit. 3, § 15 (classifying the crime as third degree manslaughter) (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 15 (1829)) (codified as amended at MISS. CODE ANN. § 97-3-45).

¹⁰¹ *Id.* tit. 3, § 16 (classifying the crime as third degree manslaughter) (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 16 (1829)). This statute, as later revised to include steam-driven railroad engines, is retained as MISS. CODE ANN. § 97-3-43.

ished as manslaughter.¹⁰²

The catchall manslaughter statute covered all other unexcused and unjustified homicides that were not murder: "Every other killing of a human being, by the act, procurement, or culpable negligence of another, when such killing is not justified or excusable, or is not declared in this act murder, or in this title manslaughter of some other degree, shall be deemed manslaughter in the fourth degree."¹⁰³

4. Consolidation and Simplification (1857)

The growing number of statutes and cases together with the complexities of practice before the numerous state courts led the legislature in 1854 to propose a complete revision of the code. It authorized the justices of the High Court of Errors and Appeals to appoint three commissioners "to revise, digest, and codify the laws of this state, and to propose such alterations or amendments thereof, and such new laws, as they may deem expedient."¹⁰⁴

¹⁰² PENITENTIARY CODE, *supra* note 67, tit. 3, § 17 (providing intoxicated physician causing death without design by administering poison, drug, or medicine, or doing any other act that causes death is guilty of third degree manslaughter) (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 17 (1829)). Section 17 has been retained with changes in MISS. CODE ANN. § 97-3-39 (adding surgery to prohibited acts).

¹⁰³ PENITENTIARY CODE, *supra* note 67, tit. 3, § 19 (copying with minor changes 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 19 (1829)); *cf.* MISS. CODE ANN. § 97-3-47 ("Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter"). Fourth degree manslaughter was punished either by fine or imprisonment for up to two years. PENITENTIARY CODE, *supra* note 67, tit. 3, § 21 (copying 2 REV. STAT. N.Y. pt. 4, ch. 1, tit. 2, art. 1, § 21 (1829)).

¹⁰⁴ Act of March 1, 1854, ch. 50, § 1, 1854 Miss. Laws 154, 154 (providing for New Code of Laws for State of Mississippi); *see* REV. CODE MISS. Introduction (1857) (summarizing historical background of this legislation). The commissioners were William L. Sharkey, William L. Harris, and Henry T. Ellett. § 1, 1854 Miss. Laws at 154. The commission presented a report and recommendations to the legislature in January 1856. *Id.* Business was continued in a special session that lasted sixty days and "resulted in the adoption of the laws contained in the present volume." *Id.*

Although the code referred to numerous printed drafts of components of the code, the University of Mississippi Law Library holdings do not include any of them and reference librarians were unable to locate any at the state archives.

The resulting Revised Code of Mississippi of 1857 radically altered the presentation of laws. Statutes were grouped by topic, and topics were arranged alphabetically. Thus within the chapter "Crimes and Misdemeanors," all murder and manslaughter statutes fell under the rubric "homicide," and "homicide" fell alphabetically between "highways" and "incest." This cumbersome method of organization, popular with nineteenth-century treatise writers, was preserved by all subsequent codes until 1972.

The 1857 recodification resulted in several important, lasting changes to the content of the homicide statutes.¹⁰⁵

From "*premeditated design*" to "*deliberate design*." The operative definition of intentional murder was revised:

The killing of a human being, without the authority of law, by any means, or in any manner, shall be murder in the following cases:—

When done with *deliberate design* to effect the death of the person killed, or of any human being:

When done in the commission of an act eminently dangerous to others, and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.¹⁰⁶

The reason for substituting "deliberate design" for "premeditated design" is not obvious, and the failure to repeat the substitution in the following paragraph obscured the dichotomy originally established between the first form of murder and the other two.

Felony murder and felony manslaughter. Felony murder, the third category of murder, was significantly reduced in scope in 1857. Under prior law any killing without design during the commission of a felony qualified as murder without regard to

¹⁰⁵ I have consulted all the relevant volumes of session laws available at the University of Mississippi Law Library, but the holdings of laws from 1848 to 1856 is apparently not complete, so it is possible that amendments to the criminal statutes preceded the recodification of the general laws.

¹⁰⁶ REV. CODE MISS. ch. 64, § 34, art. 165 (1857) (emphasis added). This is retained verbatim in MISS. CODE ANN § 97-3-19(1)(a)-(b).

the kind of felony.¹⁰⁷ In revising the code, the legislature limited murder liability to those felons who caused death while committing or attempting to commit only certain of the most serious felonies: "[Killing is murder] [w]hen done without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, arson, or robbery, or in any attempt to commit such felonies."¹⁰⁸ The predicate felonies corresponded roughly to the most serious crimes. Arson under certain circumstances was itself a capital crime.¹⁰⁹ Rape was punishable by life imprisonment.¹¹⁰ Although forgery, like burglary, was punishable by up to fifteen years in prison,¹¹¹ and kidnapping, like robbery, up to ten years in prison,¹¹² forgery and kidnapping were not included as predicate felonies under the statute.¹¹³

The exclusion of other felonies from the list must have been perceived as creating a gap, for the legislature simultaneously enacted a new manslaughter statute:

The killing of a human being, without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, except rape, burglary, arson, or robbery, or while such other is attempting to commit any felony, besides such as are above enumerated and excepted, shall be deemed manslaughter

.....¹¹⁴

¹⁰⁷ See *supra* note 72 and accompanying text.

¹⁰⁸ REV. CODE MISS. ch. 64, § 34, art. 165 (1857).

¹⁰⁹ *Id.* § 6, art. 11 (stating any person guilty of willfully setting fire or burning at night the dwelling of another shall face capital punishment).

¹¹⁰ *Id.* § 16, arts. 218-19 (stating that forcible unlawful carnal knowledge of a woman or child under ten is punishable by life imprisonment).

¹¹¹ *Id.* § 46, art. 44 (stating that burglary is punishable by up to fifteen years imprisonment). Forgery was punished as severely as burglary, up to fifteen years. *Id.* § 31, art. 124. The omission of forgery is probably due to the fact that the legislature assumed implicitly that the predicate felony causing the death must be inherently dangerous.

¹¹² *Id.* § 47, art. 222 (stating robbery is punishable by up to ten years in prison).

¹¹³ *E.g., id.* § 36, art. 186 (stating kidnapping is punishable by up to ten years in prison).

¹¹⁴ *Id.* § 34, art. 170.

This statute copied the manslaughter statute that had either imposed misdemeanor manslaughter liability or mitigated liability for killing a misdemeanant from murder to manslaughter.¹¹⁵ The new felony manslaughter statute was joined to that statute in the code.¹¹⁶ Accordingly, the meaning of the new statute depends on the meaning its precursor was understood to have in 1857. If the codifiers understood the model to incorporate the doctrine of misdemeanor manslaughter, then the new statute plainly meant to provide a form of felony manslaughter liability for deaths caused during the commission of or the attempt to commit those felonies not listed in the felony murder statute.

As amended, the statute added the general requirement that the killing occur "without malice" during the commission of a felony.¹¹⁷ This addition confused the probable meaning of the statute because at common law homicide committed during the commission of the felony established malice.¹¹⁸ Indeed, the meaning of these statutes continued to baffle codifiers and courts for over a century.¹¹⁹

¹¹⁵ See *supra* notes 87-92 and accompanying text.

¹¹⁶ REV. CODE MISS. ch. 64, § 34, art. 170 (1857).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., *Mansell and Herbert's Case*, 73 Eng. Rep. 279 (KB 1558) (holding that unintentional death caused by deliberate act of violence during felony was murder). See generally ASHWORTH, *supra* note 36, § 7.3(b) (discussing felony murder rule at common law).

¹¹⁹ The revisers of the Code in 1892, 1906, 1917, 1927, and 1930 designated this section as establishing liability for "killing while the slain was committing a felony." MISS. CODE ch. 20, § 990 (1930) (emphasis added); see also MISS. CODE ANN. ch. 16, § 1011 (1927); MISS. CODE ANN. ch. 15, § 962 (1917); MISS. CODE ch. 28 § 1232 (1906); MISS. CODE ANN. ch. 29, § 1154 (1892).

Without explanation, this statute was retitled in 1942 as "Manslaughter—killing while the slayer was committing a felony other than those specified." MISS. CODE ANN. § 11-1-2220 (1942). Although over one hundred cases were annotated under this section, virtually none of them had any relevance. Only the prosecutions for the death of a woman resulting from illegal (felonious) abortions might have involved this statute. But those cases were actually prosecuted not under this statute but under the general manslaughter statute for "culpable negligence." Compare *Lackey v. State*, 60 So. 2d 503, 505 (Miss. 1952) (affirming manslaughter conviction for death resulting from illegal abortion where jury was given instruction under involuntary manslaughter statute requiring finding of act, omission, or culpable negligence, not felony-manslaughter instruction), with *Lee v.*

Elimination of degrees of manslaughter. The 1857 revision eliminated the four different degrees of manslaughter established by the Penitentiary Code of 1839. All forms of manslaughter were now governed by the same penalty: "Any person convicted of manslaughter, shall be fined in a sum not less than five hundred dollars, or imprisoned in the county jail not more than one year, or in the penitentiary not less than two years."¹²⁰ Because the statute contained no minimum sentence, the trial judge could impose any sentence ranging from a fine up to life imprisonment.¹²¹

Resurrection of malice. The 1839 laws had avoided the term "malice" in defining both murder and manslaughter.¹²² Although the 1857 Code did not restore malice to the definition of murder, it did add the requirement of "without malice" to the

State, 86 So. 856, 857-58 (Miss. 1921) (holding death of woman resulting from illegal abortion was either murder if caused by act eminently dangerous to and evincing depraved heart regardless of human life or manslaughter if caused by act, procurement, or culpable negligence). The *Lackey* opinion was understood at the time as authority that depraved heart murder was not available for dangerous acts directed towards an individual. T.E. Douglas & George Gleason, *The Work for the Mississippi Supreme Court for the 1950-51 Term*, 23 MISS. L.J. 253, 258 (1952).

Recent opinions assume that the statute incorporates the doctrine of felony manslaughter, though that construction was apparently not challenged. *E.g.*, *Jackson v. State*, 684 So. 2d 1213, 1227, 1229 (Miss. 1996) (affirming conviction of capital murder but apparently assuming felony manslaughter would apply in absence of aggravating factors that justified refusal to instruct on lesser included offense); *Blue v. State*, 674 So. 2d 1184, 1200-01 (Miss. 1996) (holding felony manslaughter instruction properly rejected where predicate felony was omitted by statute and there was no evidence killing was "without malice"); *Butler v. State*, 608 So. 2d 314, 319-20 (Miss. 1992) (holding felony manslaughter instruction required in felony murder prosecution where predicate felony not omitted by statute).

¹²⁰ REV. CODE MISS. ch. 64, § 34, art. 183 (1857).

¹²¹ The sentencing rules adopted in 1839 provided that where a statute authorized imprisonment for a term not less than any specified number of years, "the court authorised to pronounce judgment upon such conviction, may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than such as are prescribed." PENITENTIARY CODE, *supra* note 67, tit. 3, § 12. Though this provision was apparently not included in the code after revision, it expressed the prevailing view that the court rather than the jury determined the sentence upon conviction. *See id.* § 20 (discussing sentencing guidelines without mentioning who imposes sentence).

¹²² *See supra* notes 71-72, 82-85 and accompanying text.

new manslaughter statute.¹²³ It also amended two other manslaughter statutes to substitute the requirement of "without malice" for the previous requirement of "without design."¹²⁴ The misdemeanor manslaughter statute was altered to require the homicide be "without malice."¹²⁵ This alteration was made, perhaps, to distinguish intentional and hot-blooded killings that qualified as manslaughter from "deliberate design" murder.¹²⁶ Likewise, the general involuntary manslaughter statute was amended to substitute lack of "malice" for lack of "design": "The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, without authority of law, and not in necessary self-defence, shall be deemed manslaughter."¹²⁷ A similar change was made for involuntary manslaughter committed by use of a dangerous weapon: "The killing of another in the heat of passion, without malice, by the use of a dangerous weapon, without authority of law, and not in necessary self-defence, shall be deemed manslaughter."¹²⁸ None of the other manslaughter statutes with culpable mental states, which included "deliberately assisting," "wilful killing," "involuntarily killing," and "culpable negligence," were similarly altered to require lack of malice.¹²⁹

Although malice was not added to the statutory definition of murder, the old common law idea that murder required malice, and manslaughter its absence, proved tenacious. Edward Mayes, Dean and Professor at the University of Mississip-

¹²³ REV. CODE MISS. ch. 64, § 34, art. 170 (1857).

¹²⁴ *Id.* arts. 174, 176.

¹²⁵ *Id.* art. 170.

¹²⁶ This does not explain why "without malice" was required for the related felony manslaughter statute. *See id.* In that context, the lack of malice is either logically impossible, malice being provided by definition by the commission of a felony, or it is silly. *See supra* notes 27, 35 and accompanying text. It is not likely that the legislature wanted generally to mitigate liability for hot-blooded felons unless they were anticipating some elaborate circumvention of voluntary manslaughter by means of the felony murder doctrine.

¹²⁷ REV. CODE MISS. ch. 64, § 34, art. 174 (1857). This is retained as part of MISS. CODE ANN. § 97-3-35 (2000).

¹²⁸ REV. CODE MISS. ch. 64, § 34, art. 176 (1857). This is retained as part of MISS. CODE ANN. § 97-3-35.

¹²⁹ *See* REV. CODE MISS. ch. 64, § 34, arts. 171-172, 177, 182 (1857) (lacking requirement of "without malice").

pi School of Law, taught his students: "Murder is the unlawful killing of a human being with malice aforethought, including duels. Manslaughter is the unlawful killing of a human being without malice."¹³⁰ In a series of opinions the supreme court maintained that the statutory requirements of "premeditated design" and "deliberate design" meant "express malice" and a "sedate, deliberate mind and formed design [to] kill another."¹³¹ Today "deliberate design," "premeditated design," and "malice aforethought" are said to be synonymous, and deliberate design can be formed only moments before the act evidencing the intent.¹³² But when voluntary manslaughter instructions are given, the murder instructions must carefully explain "how to determine the 'aforethought' portion of 'malice aforethought' or the 'deliberation' portion of 'deliberate design.'"¹³³ This resurrection of malice led the courts once again

¹³⁰ EDWARD MAYES, RIBS OF THE LAW, BEING A SERIES OF CONCISE STATEMENTS OF THE OUTLINES FOR LEGAL STUDY FOR THE SERVICE OF LAW STUDENTS 105 (1909). Mayes, son-in-law of United States Supreme Court Justice L.Q.C. Lamar, had retired as dean of the law school and as chancellor of the University when this book was published, but its subtitle indicates that it derived from his introductory law lectures.

¹³¹ *McDaniel v. State*, 16 Miss. (8 S. & M.) 401, 409 (1847) (opining that premeditated design meant malice aforethought); *see also* *Hawthorne v. State*, 58 Miss. 778, 784 (1881) (stating that phrases are "used convertibly"); *Ex parte Wray*, 30 Miss. 673, 678 (1856) (opining that express malice meant sedate, deliberate mind and formed design to kill another).

The court further held that malice was a necessary element of murder. *Guest v. State*, 52 So. 211, 212 (Miss. 1910); *see* *Carter v. State*, 25 So. 2d 470, 473 (Miss. 1946) (stating that difference between murder and manslaughter is presence of deliberation and malice in murder and its absence in manslaughter); *see also* *Brown v. State*, 1999-KA-00058-COA, ¶¶ 8-28, 768 So. 2d 312, 315-19 (Miss. Ct. App. 1999) (discussing cases defining deliberate design).

¹³² *See* *Tran v. State*, 681 So. 2d 514, 517 (Miss. 1996) (explaining that in Mississippi case law all three terms mean same thing); *see also* *Neal v. State*, 2000-KA-01291-SCT, ¶¶ 14-18, 805 So. 2d 520, 525 (Miss. 2002) (holding that in absence of voluntary manslaughter instruction, defining deliberate design so as not to require its existence for any length of time before the act of violence was, if error at all, harmless); *Taylor v. State*, 1999-KA-01308-SCT, ¶ 15, 795 So. 2d 512, 516 (Miss. 2001).

¹³³ *Russell v. State*, 1999-KA-00566-SCT, ¶ 12, 789 So. 2d 779, 782 (Miss. 2001) (holding trial court erred in refusing requested instruction defining malice aforethought as "full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences; to calculate, plan, contemplate").

to confront the vexing issue of implied malice.¹³¹

The troubling consequence of this is that the terms "malice" and "malice aforethought," which bedeviled legal scholars for generations, now figure prominently in instructions designed to help jurors apply the law of Mississippi. Even when judges in England were forced by tradition to employ the common law terminology in the 1800s, they were already sternly cautioning jurors *not* to give the words "malice aforethought" their ordinary meaning.¹³⁵ Paradoxically, the Mississippi courts, blessed with legislation that avoided the terms, continued to instruct jurors in language of malice. Appellate courts affirmed convictions obtained upon such instructions and opined broadly that "malice aforethought" was synonymous with "deliberate design."¹³⁶

The Model Jury Instructions for deliberate design murder today offer the trial judge confusing choices. One model instruction requires the jury to find that the defendant "willfully and with malice aforethought killed" without defining malice or willfully.¹³⁷ A second requires the jury to find the defendant "did, with deliberate design, kill."¹³⁸ A third combines the first two and requires the jury to find that the defendant "[w]illfully, with malice aforethought and with a deliberate design to effect

¹³⁴ The history of this doctrine in Mississippi recapitulated in miniature the common law experience. First the courts understood malice as requiring deliberate design that preceded the killing. *Bangren v. State*, 17 So. 2d 599, 600 (Miss. 1944). Then the courts found that malice and deliberate design could be formed at the time of the killing, *Carter*, 25 So. 2d at 473, and that no malice other than deliberate design was required. *Hughes v. State*, 42 So. 2d 805, 807-08 (Miss. 1949); *Criss v. State*, 30 So. 2d 613, 614-15 (Miss. 1947). It followed that malice could be implied from the use of a deadly weapon. *Dickins v. State*, 43 So. 2d 366, 373-74 (Miss. 1950); *Smith v. State*, 38 So. 2d 725, 726 (Miss. 1949).

¹³⁵ "The definition of murder is unlawful homicide with malice aforethought, and the words malice aforethought are technical. You must not, therefore construe them or suppose that they can be construed by ordinary rules of language." Keedy, *supra* note 71, at 759 n.2 (quoting jury instruction in *Regina v. Serné*, 16 Cox Crim. Cas. 311, 312 (Eng. Cent. Crim. Ct. 1887)).

¹³⁶ See, e.g., *Lancaster v. State*, 472 So. 2d 363, 367 (Miss. 1985); *Dye v. State*, 90 So. 180, 181 (Miss. 1922).

¹³⁷ MODEL JURY INSTRUCTIONS, *supra* note 92, § 8.1. This is the first instruction and is presumably given frequently.

¹³⁸ *Id.* § 8:2.

the death of [victim] killed [the victim]."¹³⁹ The three manslaughter instructions similarly require the jury to find that the defendant killed "without malice"¹⁴⁰ but do not define or explain malice.

5. Modern Adjustments

By 1857 the basic structure of Mississippi's current homicide law was in place. Three significant innovations took place in the twentieth century.

Capital murder. Mississippi never had degrees of murder and did not distinguish murder and capital murder until 1974.¹⁴¹ As did previous statutes for the state and territory, the 1857 Code punished murder by death.¹⁴² And in abandoning the elaborate degrees of manslaughter adopted in 1839, it left the punishment of manslaughter to the court's discretion.¹⁴³

Death remained the only punishment for murder until 1875 when the legislature provided: "[T]he jury may, in their discretion, declare that the penalty, or punishment, shall be imprisonment in the Penitentiary for life; but if the jury shall omit to so declare the penalty in their verdict, then the Court shall pronounce the death penalty."¹⁴⁴ The requirement of unanimous jury agreement to depart from capital punishment was strictly imposed.¹⁴⁵ Only in 1906 did legislation effectively provide life-imprisonment as the default punishment for

¹³⁹ *Id.* § 8:3.

¹⁴⁰ *Id.* § 8:8 (killing while committing felony); *id.* § 8:12 (heat of passion); *id.* § 8:13 (lesser included voluntary manslaughter).

¹⁴¹ Act of April 23, 1974, ch. 576, § 6, 1974 Miss. Laws 863, 865 (establishing a class of crimes known as capital murder and providing the penalty of death as punishment thereof).

¹⁴² REV. CODE MISS. ch. 64, § 34, art. 167 (1857) ("Every person who shall be convicted of murder, shall suffer death.").

¹⁴³ See *supra* notes 120-21 and accompanying text.

¹⁴⁴ Act of March 4, 1875, ch. 58, § 2, 1875 Miss. Laws 79, 79.

¹⁴⁵ Although the Mississippi Supreme Court held that a jury must be instructed on the consequences of its failure to agree if so requested, *Walton v. State*, 57 Miss. 533, 535-36 (1879), it affirmed a capital sentence where the jury returned a verdict of guilty and added the words that it pleaded "the mercy of the court." *Penn v. State*, 62 Miss. 450, 467-69 (1884).

murder by requiring a jury to agree unanimously on a death sentence.¹⁴⁶

The power of juries to impose death penalties as a matter of unguided discretion was declared unconstitutional in 1972.¹⁴⁷ The legislature responded in 1974 by revising the murder statute, specifying those forms of homicide for which capital punishment could be imposed.¹⁴⁸ Legislation also established criteria for a jury to employ in deciding whether to sentence to death. Unless the defendant was the principal who

¹⁴⁶ Act of April 17, 1906, ch. 248, 1906 Miss. Laws Spec. Sess. 281, 281 (adding "[o]r unless the jury shall certify its disagreement as to the punishment as provided by section 1439, in which case the court shall fix a punishment at imprisonment for life" to section 1151 of the Code of 1906). The change was effected by amending the final revisions to the proposed 1906 Code rather than by revisions to the 1892 Code.

¹⁴⁷ *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (overruling *McGautha v. California*, 402 U.S. 183 (1971)); see U.S. CONST. amend. VIII ("[N]or [shall] cruel and unusual punishments [be] inflicted"). Justices Brennan and Marshall opined that the death penalty per se was unconstitutional. *Furman*, 408 U.S. at 291-95 (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring). Justices Douglas, Stewart, and White held that death penalty regimes were unconstitutional as applied because the actual imposition of death was arbitrary. *Id.* at 255-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); see also *id.* at 309-10 (Stewart, J., concurring):

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist each filed dissenting opinions. See *id.* at 375 (Burger, C.J., dissenting), *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

After *Furman*, state legislatures revised death penalty schemes in an effort to restrict discretion and reduce arbitrary results. The Supreme Court upheld Georgia's system under which a jury imposing the death sentence was required to find the presence of statutory aggravating circumstances, and the state court reviewed death sentences to determine whether the judgment was the result of passion, prejudice, or other improper motive, and whether the judgment was excessive or disproportionate as compared to penalties in other similar cases. *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976); see *Arave v. Creech*, 507 U.S. 463, 471 (1993) (holding that capital sentencing schemes must have clear objective standards); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (stating that capital sentencing scheme must suitably direct and limit discretion "so as to minimize the risk of wholly arbitrary and capricious action") (quoting *Gregg*, 428 U.S. at 189).

¹⁴⁸ Act of April 23, 1973, ch. 576, 1974 Miss. Laws 863.

“actually killed,” these criteria require that the defendant intended or foresaw the victim’s death by specifying that the capital defendant must have attempted or intended to kill, or must have “contemplated that lethal force would be employed.”¹⁴⁹

The sentencing jury must also find that “sufficient aggravating circumstances” exist out of eight listed factors.¹⁵⁰ To impose a sentence of death the jury must unanimously find that none of seven mitigating circumstances outweigh aggravating circumstances.¹⁵¹ Designed to comport with evolving constitutional standards,¹⁵² the procedures appear onerous. Nevertheless, many of the factors are satisfied by routine killings that otherwise meet the elements of capital murder. Two forms of capital murder are themselves listed as aggravating circumstances: capital felony murder and capital murder by use or detonation of a bomb or explosive device.¹⁵³ The commonplace motive of pecuniary gain is an aggravating circumstance.¹⁵⁴ Aggravating factors also include the circumstance that the offense was “especially heinous, atrocious or cruel.”¹⁵⁵ Because most, if not all, capital murders would satisfy this criterion, it was held to be unconstitutionally vague in the ab-

¹⁴⁹ MISS. CODE ANN. § 99-19-101(7)(a)-(d) (2000).

¹⁵⁰ *Id.* § 99-19-101(2)(b). The jury must so find unanimously and in writing. *Id.* § 99-19-101(3)(b).

¹⁵¹ *Id.* § 99-19-101(3)(c).

¹⁵² “The State must ‘channel the sentencer’s discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.’” *Arave*, 507 U.S. at 471 (quoting *Lewis*, 497 U.S. at 774 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980))).

¹⁵³ MISS. CODE ANN. § 99-19-101(5)(d). Authorizing the death penalty for killing without design during the commission of certain felonies but not for premeditated murder committed in an atrocious way is not in violation of proportionality under the Eighth Amendment. *Holland v. State*, 93-DP-00494-SCT, ¶¶ 5-11, 705 So. 2d 307, 319-20 (Miss. 1997). The court’s reasoning included the suggestion that the death penalty might be a more effective deterrent for felony murders than for atrocious simple murders. *Holland*, 93-DP-00494-SCT, ¶ 10, 705 So. 2d at 320.

¹⁵⁴ MISS. CODE ANN. § 99-19-101(5)(f). Robbery and pecuniary gain should not be counted as two separate factors because robbery is necessarily committed for gain. *See Booker v. State*, 92-KA-00877-SCT, ¶¶ 14-15, 699 So. 2d 132, 135-36 (Miss. 1997); *Blue v. State*, 674 So. 2d 1184, 1219-20 (Miss. 1996).

¹⁵⁵ MISS. CODE ANN. § 99-19-101(5)(h).

sence of further limiting definitions¹⁵⁶ and was subsequently narrowed to methods of killing that involve the infliction of physical or mental pain before death.¹⁵⁷

Violence-prone persons are likely to have a criminal record or be incarcerated, and the fact that a defendant was previous-

¹⁵⁶ *Shell v. Mississippi*, 498 U.S. 1, 2-3 (1990) (per curiam) (holding insufficient to cure vagueness limiting instructions defining heinous as "extremely wicked or shockingly evil," atrocious as "outrageously wicked and vile," and cruel as "designed to inflict a high degree of pain with indifference to, or even enjoyment of" suffering); see also *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990) (holding that failure to supply capital jury with properly limiting definition of "especially heinous, atrocious, or cruel" is error); *Booker*, 92-KA-00877-SCT, ¶¶ 10-15, 699 So. 2d at 135 (reversing and remanding capital murder conviction where "especially heinous, atrocious, or cruel" circumstances as aggravators was improperly applied). But see *Arave*, 507 U.S. at 471 (holding that "utter disregard for human life" constituted legitimate aggravating circumstance at least as limited by judicial construction to mean "cold-blooded, pitiless slayer"). The dissent in *Arave* observed that this might be satisfied by every intentional killing. *Id.* at 479-89 (Blackmun, J., dissenting).

¹⁵⁷ The following limiting instruction used in Mississippi is satisfied by a simple finding of an intent to inflict physical or mental pain:

An especially heinous, atrocious or cruel capital offense is one accompanied by such additional acts as to set the crime apart from the norm of murders—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

If you find from the evidence beyond a reasonable doubt that the defendant utilized a method of killing which caused serious mutilation, or that there was dismemberment of the body prior to death, or that the defendant inflicted physical or mental pain before death, or that there was mental torture or aggravation before death, or that a lingering or torturous death was suffered by the victim then you may find this aggravating circumstance.

Crawford v. State, 94-DP-01016-SCT, ¶ 70, 716 So. 2d 1028, 1047 (Miss. 1998). In *Crawford*, the court approved the instruction, finding that evidence that the defendant stabbed the victim and allowed her to bleed to death after commission of capital felony satisfied the aggravating criteria. *Crawford*, 94-DP-01016-SCT, ¶¶ 70-74, 716 So. 2d at 1047-48. The court also suggested in dictum that a possible erroneous instruction is not reversible error where the jury found one other criterion present. *Id.* ¶ 72, 716 So. 2d at 1047. The instruction may be satisfied when the victim lives even briefly with knowledge that the killer is going to kill him or survives an initial wounding even briefly before dying of it or of a second injury. *Edwards v. State*, 97-DP-00566-SCT, ¶¶ 136-37, 737 So. 2d 275, 315 (Miss. 1999) (reversing on other grounds but opining that evidence was sufficient for finding offense was especially heinous, atrocious, or cruel where one victim was shot in the head, stuffed in trunk, forced to walk and shot fatally and where another victim, two-years old, was shot as he leaned over his father).

ly convicted of a "felony involving the use or threat of violence to the person" or is under sentence of imprisonment are aggravating factors.¹⁵⁸ The fact that a killing was committed either while avoiding arrest or attempting to escape provides an aggravating circumstance,¹⁵⁹ as does the fact that a capital murder was committed to "disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws."¹⁶⁰ Knowingly creating "a great risk of death to many persons" also provides an aggravating factor.¹⁶¹

A defendant convicted of capital murder but sentenced to life imprisonment is not eligible for parole.¹⁶²

The legislature initially designated as capital murder what had previously been statutory felony murder—killing with or without design during the commission or attempt to commit rape, burglary, kidnapping, arson, or robbery.¹⁶³ Subsequent legislation expanded the statutory felonies to include sexual battery, unnatural intercourse with a child under age twelve, and felonious child abuse.¹⁶⁴

The legislature also designated the murder of certain victims as capital murder. Murder of peace officers and firemen is capital murder.¹⁶⁵ To qualify as capital murder under this subsection, the killing must satisfy the elements for non-capital murder. The murder must occur "while such officer or fireman

¹⁵⁸ MISS. CODE ANN. § 99-19-101(5)(a)-(b). Commission of a capital offense by a person currently imprisoned for a felony involving use or threat of personal violence satisfies both and may be counted twice. *Hughes v. State*, 97-DP-00028-SCT, ¶¶ 181-184, 735 So. 2d 238, 277-78 (Miss. 1999). Sentence of imprisonment is satisfied by a person under suspended sentence for grand larceny and burglary. *Evans v. Thigpen*, 631 F. Supp. 274, 283 (S.D. Miss. 1986), *aff'd*, 809 F.2d 239 (5th Cir. 1987).

¹⁵⁹ MISS. CODE ANN. § 99-19-101(5)(e). Killing a victim to avoid getting caught satisfies this criterion. *Edwards*, 737 So. 2d at 320.

¹⁶⁰ MISS. CODE ANN. § 99-19-101(5)(g).

¹⁶¹ *Id.* § 99-19-105(5)(c).

¹⁶² *Id.* § 47-7-3(1)(f) ("No person shall be eligible for parole who is charged, tried, convicted and sentenced to life imprisonment under the provisions of Section 99-19-101.").

¹⁶³ Act of April 23, 1974, ch. 576, § 6, 1974 Miss. Laws 863, 866 (codified as amended at MISS. CODE ANN. § 97-3-19(2)(e)).

¹⁶⁴ Act of March 29, 1983, ch. 429, § 1, 1983 Miss. Laws 305, 306 (codified as amended at MISS. CODE ANN. § 97-3-19(2)(e), (f)).

¹⁶⁵ MISS. CODE ANN. § 97-3-19(2)(a).

is acting in his official capacity or by reason of an act performed in his official capacity," and it must be "with knowledge that the victim was a peace officer or fireman."¹⁶⁶ The statute broadly defines peace officers and firemen:

[T]he term "peace officer" means any state or federal law enforcement officer including but not limited to a federal park ranger, the sheriff of [a county and his deputies, a constable, a marshal, chief of police] or police officer of a city or town, a conservation officer, a parole officer, a judge, prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the State Tax Commission, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections pursuant to Section 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary.¹⁶⁷

Murder of "any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official" is capital murder.¹⁶⁸

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (emphasis added). The text in brackets was included as a single line of text in the enrolled bill, H.R. 608, 1992 Leg., 107th Reg. Sess. (Miss. 1992) (on file with Hon. Ed Perry, Clerk of Mississippi House of Representatives), and was evidently dropped by mistake from the final act in 1992. See Act of May 14, 1992, ch. 508, § 1, 1992 Miss. Laws 825, 825-26. The text of an enrolled bill controls over inconsistent text in the session laws or code. MISS. CODE ANN. § 1-1-8 (Supp. 2001). But the section has been reenacted without the omitted language. Cf. Act of March 25, 1996, ch. 422, § 3, 1996 Miss. Laws 259, 260-61 (adding employees of Department of Corrections but omitting deputies and other victims omitted by mistake in 1992). The length of the list reinforces the ritual importance of naming certain classes of victims, and the current list is the result of repeated amendments. See Act of April 30, 2000, ch. 516, § 134, 2000 Miss. Laws 667, 722 (substituting "conservation officer" for "game warden"); § 3, 1996 Miss. Laws at 260-61 (adding certain department of corrections employees); § 1, 1992 Miss. Laws at 825-26 (defining peace officer as "any state or federal law enforcement officer"); § 6, 1974 Miss. Laws at 865-66 (specifying forms of homicide for which capital punishment can be imposed, including killing of peace officers or fireman).

¹⁶⁸ MISS. CODE ANN. § 97-3-19(2)(h) (2000). To be capital murder, the homicide must constitute murder of an elected official "with knowledge that the victim was a public official." *Id.*

Furthermore, murder committed by certain methods ("use or detonation of a bomb or explosive device") is capital murder.¹⁶⁹ Murder committed by certain killers is capital murder. These include persons "under sentence of life imprisonment" and persons offering or receiving anything of value for murder.¹⁷⁰ Most recently, the legislature added murders done on educational property.¹⁷¹

Causing death of fetus. Although the killing of an embryo or fetus was not homicide at common law, since 1839 Mississippi has punished as manslaughter the intentional killing of an unborn quick child under two circumstances. First, the killing of an unborn quick child is manslaughter when the death was both 1) willful¹⁷² and 2) caused by an injury to the body of the pregnant woman that was inflicted with a mental state that would make the actor guilty of murder if the pregnant woman

¹⁶⁹ *Id.* § 97-3-19(2)(c).

¹⁷⁰ *Id.* § 97-3-19(2)(b), (d).

¹⁷¹ Act of April 17, 1998, ch. 588, § 1, 1998 Miss. Laws 1006, 1007. This section is currently codified as amended at MISS. CODE ANN., § 97-3-19(2)(g) ("Murder which is perpetrated on educational property as defined in Section 97-37-17."). Educational property is broadly defined as

any public or private school building or bus, public or private school campus, grounds, recreational area, athletic field, or other property owned, used or operated by any local school board, school, college or university board of trustees, or directors for the administration of any public or private educational institution or during a school related activity; provided however, that the term "educational property" shall not include any sixteenth section school land or lieu land on which is not located a school building, school campus, recreational area or athletic field.

Id. § 97-37-17(1)(a).

¹⁷² The statute requires "willful killing of an unborn quick child." MISS. CODE ANN. § 97-3-37(1). Despite a prominent annotation proclaiming that "it is not necessary to prove that the defendant knew that the mother was pregnant or that the deceased baby was 'quick,'" (first annotation under statute), the case cited holds no such thing. *See* *Sitton v. State*, 98-KA-00459-SCT, ¶¶ 15-17, 760 So. 2d 28, 31-32 (Miss. 1999). In *Sitton*, the defendant deliberately ran over and killed a woman who was seven months pregnant. *Sitton*, 98-KA-00459-SCT, ¶ 7, 760 So. 2d at 29-30. Evidence showed the woman was visibly pregnant and the fetuses well developed. *Id.* ¶ 17, 760 So. 2d at 31-32. In affirming the manslaughter convictions, Justice Diaz rejected the argument that there was insufficient evidence that the defendant knew the woman was pregnant or that the fetuses qualified as quick children. *Id.* ¶¶ 15-17, 760 So. 2d at 31-32. In further dicta, Justice Diaz observed only that other jurisdictions had imposed strict liability on persons who caused deaths of fetuses. *Id.*

died.¹⁷³ Second, the old statute broadly criminalized abortions that were not necessary to save the life of the pregnant woman or were not so certified by two physicians.¹⁷⁴

In 2000, this second form of manslaughter of a fetus, unconstitutional in many applications, was replaced by a broad fetal injury statute.¹⁷⁵ The new statute does not label fetus killing as "manslaughter," but the legislature included it in the code among the manslaughter statutes.¹⁷⁶ It provides that an intentional injury to a pregnant woman that "results in a miscarriage or stillbirth" is punishable by not more than twenty years, the sentence authorized for manslaughter.¹⁷⁷ The statute also punishes intentional injuries to a pregnant woman that result in injuries other than death of the embryo or fetus.¹⁷⁸

Aggravated DUI. In 1983, as part of the implied consent law, the legislature created a new crime for causing death or inflicting serious injuries while intoxicated.¹⁷⁹ There are four elements. First, the defendant must meet the statutory definition of intoxicated:

¹⁷³ MISS. CODE ANN. § 97-3-37(1); *see supra* note 101 (discussing origin of statute). There is no merger where the mother dies, and the killer can be convicted both for the murder of the mother and manslaughter for causing the death of the unborn quick child. *State v. Willis*, 457 So. 2d 959, 960 (Miss. 1984).

Quickening refers to the first perceivable motion of the fetus in the uterus. *Willis v. State*, 518 So. 2d 667, 668 (Miss. 1988). In general, this occurs after the first trimester, about half way through the pregnancy. BLACK'S LAW DICTIONARY 1261 (7th ed. 1999); *see Willis*, 518 So. 2d at 667 (affirming conviction for death of unborn quick child where fetus was almost thirty-two weeks).

¹⁷⁴ *See supra* note 101.

¹⁷⁵ *See Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortions before certain point in pregnancy); *see also supra* note 98.

¹⁷⁶ Act of April 16, 2000, ch. 337, § 1, 2000 Miss. Laws 114 (amending MISS. CODE ANN. § 97-3-37).

¹⁷⁷ MISS. CODE ANN. § 97-3-37(2)(a). It authorizes a fine of not more than \$7500, while the fine authorized for manslaughter is not less than \$500 and has no upper limit. *Id.*

¹⁷⁸ *Id.* § 97-3-37(2)(b) (punishing great bodily harm to embryo or fetus by fine and imprisonment for not more than twenty years); *id.* § 97-3-37(2)(c) (punishing serious or aggravated physical injury to embryo or fetus by fine and imprisonment for not more than one year); *id.* § 97-3-37(2)(d) (punishing physical injury to embryo or fetus by fine and not more than ninety days imprisonment).

¹⁷⁹ Act of April 6, 1983, ch. 466, 1983 Miss. Laws 403 (codified as amended at MISS. CODE ANN. § 63-11-30 (1996 & Supp. 2001)).

(1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; (c) has an alcohol content of ten one-hundredths percent (.10%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter; (d) is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law; or (e) has an alcohol concentration of four one-hundredths percent (.04%) or more, based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's blood, breath or urine, administered as authorized by this chapter for persons operating a commercial motor vehicle.¹⁸⁰

Second, the defendant must be operating a motor vehicle. Third, he or she must be doing so "in a negligent manner."¹⁸¹ And fourth, he or she must either cause the death of another or cause certain serious disfiguring or disabling injuries.¹⁸² Orig-

¹⁸⁰ MISS. CODE ANN. § 63-11-30(1)(a)-(e) (Supp. 2001). The original statute defined intoxicated as being "under the influence of intoxicating liquor . . . [or] any other substance which has impaired such person's ability to operate a motor vehicle," or having .10 percent or more parts alcohol in blood. § 7, 1983 Miss. Laws at 406. That definition was revised over time to add persons under the influence of controlled substances, to reduce to .08 and then .02 percent the blood level of alcohol needed for persons below the legal age to purchase alcoholic beverages under state law, and to reduce to .04 percent the blood level needed for persons operating commercial motor vehicles. MISS. CODE ANN. § 63-11-30(1).

¹⁸¹ MISS. CODE ANN. § 63-11-30(5). The supreme court has made clear that negligence in this statute requires nothing more than simple negligence and does not require the culpable negligence required for manslaughter. *Banks v. State*, 525 So. 2d 399, 400 (1988).

¹⁸² MISS. CODE ANN. § 63-11-30(5) (defining crime as committed where person

inally punished by up to five years in prison,¹⁸³ the crime of aggravated DUI was held to be a lesser included offense of manslaughter.¹⁸⁴ The punishment was subsequently increased to ten years and then to twenty-five years imprisonment—a penalty greater than that prescribed for manslaughter.¹⁸⁵ This crime today is also subject to a minimum term of imprisonment of five years¹⁸⁶ and there is no similar minimum penalty for manslaughter.¹⁸⁷ Thus it should no longer be considered as a lesser offense of manslaughter.

6. Summary: Unintended Killings Under the Current Code

Under current Mississippi law, unintended killings may be either capital murder, murder, manslaughter, or aggravated vehicular homicide.

under the influence operates motor vehicle and in negligent manner "causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another"). The court held the injury requirement satisfied by a broken pelvis where there was evidence that the injuries would have been life-threatening without medical intervention and the victim suffered a limp and some continuing pain at the time of trial. *Holloman v. State*, 656 So. 2d 1134, 1140 (Miss. 1995).

¹⁸³ § 13, 1983 Miss. Laws at 409.

¹⁸⁴ *Mayfield v. State*, 612 So. 2d 1120, 1124-26 (Miss. 1992). The court held in reasoning based partly on erroneous reliance on the title given the statute by the code, and questioned by the dissent, that this offense proscribes drunk driving rather than negligent killing. *Mayfield*, 612 So. 2d at 1128. Accordingly, it held that a person who killed two persons could be convicted only of a single count. *Id.*

¹⁸⁵ Act of April 21, 1989, ch. 565, § 1, 1989 Miss. Laws 755, 757 (punishing aggravated DUI with ten years imprisonment). *But see* MISS. CODE ANN. § 63-11-30(5) (making maximum imprisonment for aggravated DUI twenty-five years); *cf* MISS. CODE ANN. § 97-3-25 (2000) (making imprisonment for manslaughter twenty years). The former penalties prescribed for driving under the influence were held not to constitute cruel or unusual punishment. *See Holloman*, 656 So. 2d at 1138; *Banks*, 525 So. 2d at 403. That case may not clearly control today, however, for through a combination of case law and statutory changes, the person who negligently causes an injury (e.g., a limp and some pain) is now subject to a mandatory punishment at levels far exceeding those for causing death with culpable negligence, and the level of intoxication has been reduced for minors. These changes raise new issues of proportionality not decided by prior cases.

¹⁸⁶ Act of May 20, 2000, ch. 542, § 3, 2000 Miss. Laws 832, 840 (codified as amended at MISS. CODE ANN. § 63-11-30(5) (Supp. 2001)).

¹⁸⁷ *See* MISS. CODE ANN. § 97-3-25 (2000).

Capital murder. Capital murder can be committed in two different ways that do not require intent. First, killing is capital murder if done during the commission or attempt to commit any of the predicate capital felonies.¹⁸⁸ Second, killing is capital murder when it meets the definition of murder and one of the following:

- the victim was a peace officer or fireman who is killed while acting in his or her official capacity or by reason of an act performed in his or her official capacity, and the killer knew the victim was a peace officer or fireman;
- the victim was an elected official and the killer knew the victim was an elected official;
- the murder was perpetrated by use or detonation of a bomb or explosive device;
- the murder was perpetrated by a person offered or receiving anything of value;
- the murder was perpetrated by a person under sentence of life imprisonment; or
- the murder was perpetrated on educational property.¹⁸⁹

Murder. Murder can be committed without intent by an act eminently dangerous and evincing a depraved heart regardless of human life.¹⁹⁰ It can also be committed without intent during non-capital felonies.¹⁹¹ The mens rea required for unintentional killings that qualify as murder other than felony murder and its difference from the mens rea required for manslaughter is discussed in Part III.

Manslaughter. Today unintentional criminal homicides not prosecuted as aggravated DUI are prosecuted either as depraved heart murder or under the general statute that defines manslaughter as an unlawful killing resulting from the killer's "act, procurement, or culpable negligence."¹⁹² The mens rea required for this form of manslaughter and its difference from

¹⁸⁸ See *supra* notes 163-64 and accompanying text.

¹⁸⁹ See *supra* notes 165-71 and accompanying text (discussing relevant statutes).

¹⁹⁰ See MISS. CODE ANN. § 97-3-19; see also *supra* note 75.

¹⁹¹ MISS. CODE ANN. § 97-3-19(1)(c); see *supra* note 6 (quoting statute).

¹⁹² MISS. CODE ANN. § 97-3-47; see *supra* note 92 (discussing the origin of this statute).

the mens rea required for murder are discussed in Part III.

Section 97-3-47 is today regarded as Mississippi's equivalent of a general involuntary manslaughter statute.¹⁹³ The court of appeals has even opined that the statute codifies both manslaughter based on culpable negligence and manslaughter based on an intentional wrongful act that unintentionally causes death.¹⁹⁴ Nevertheless, language of the statute that is today given no legal effect provides that the statute applies only to those "other" killings by act, procurement, or culpable negligence "not provided for in this title."¹⁹⁵ The unmistakable original meaning of this language was to limit the application of the statute to those killings not indictable under some other more specific murder or manslaughter statute, and the 1839 Code's language stated this still more explicitly: "*Every other killing . . . not declared in this act murder, or in this title manslaughter of some other degree, shall be deemed manslaughter in the fourth degree.*"¹⁹⁶ The drafters in 1839 envisaged a hierarchy of degrees of murder under which the specific statutory forms of manslaughter were punished more seriously. The least serious fourth degree classification was reserved for two different kinds of killings: 1) involuntary killings with weapons and heat of passion killings by means neither cruel nor unusual that did not qualify as excusable homicide,¹⁹⁷ and 2) the residual category covering all other unlawful killings not prohibited

¹⁹³ *Craig v. State*, 520 So. 2d 487, 491 (Miss. 1988) ("MISS. CODE ANN. § 97-3-47 is an involuntary manslaughter statute . . .").

¹⁹⁴ *Miller v. State*, 97-KA-00072-COA, ¶ 14, 733 So. 2d 846, 850 (Miss. Ct. App. 1998) ("While much of the reported case law on Section 97-3-47 deals with manslaughter convictions based on the theory of culpable negligence, we are satisfied that the language is sufficient to encompass the other general form of common law involuntary manslaughter."). The court held that the statute applied where the defendant's action in striking the victim was unprovoked and intentional but not where "one blow with a fist would not, in the normal circumstance, be expected to produce a death. Neither does the striking of another with a fist, in the normal circumstance, rise to the level of a felony." *Miller*, 97-KA-00072-COA, ¶ 14, 733 So. 2d at 850.

¹⁹⁵ MISS. CODE ANN. § 97-3-47 (emphasis added).

¹⁹⁶ PENITENTIARY CODE, *supra* note 67, tit. 3, § 19 (emphasis added); *see supra* text at note 103 for full text of this statute.

¹⁹⁷ *Id.* § 18.

by any other applicable statute.¹⁹⁸

The purpose of the statutory language limiting involuntary manslaughter to "other" killings was to encourage the prosecution of killings under more specific (and more severely punished) forms of homicide. Such other more specific manslaughter provisions included killings during the commission of certain felonies¹⁹⁹ and misdemeanors,²⁰⁰ unnecessary killings of felons,²⁰¹ involuntary homicide of trespassers,²⁰² unintended killing by drunken doctors,²⁰³ and killings resulting from overloading boats²⁰⁴ and boiler explosions on steamboats and railroad engines.²⁰⁵

After degrees of manslaughter were eliminated in 1857, the consequences of indicting under different manslaughter statutes became less significant. Nevertheless, the code retained the residuary language—"[e]very other killing . . . not provided for in this chapter."²⁰⁶ Although this language has been preserved down to the present, there have been no cases giving it effect by requiring prosecution under other manslaughter statutes.²⁰⁷ And, though the issue has apparently never been raised to the court, there have been numerous prosecutions under the statute that could have been brought under other more specific manslaughter statutes, and courts have never suggested anything was amiss.²⁰⁸ Consequently, despite

¹⁹⁸ *Id.* § 19

¹⁹⁹ MISS. CODE ANN. § 97-3-27.

²⁰⁰ *Id.* § 97-3-29.

²⁰¹ *Id.* § 97-3-31.

²⁰² *Id.* § 97-3-33.

²⁰³ *Id.* § 97-3-39.

²⁰⁴ *Id.* § 97-3-41.

²⁰⁵ *Id.* § 97-3-43.

²⁰⁶ REV. CODE MISS. ch. 64, § 34, art. 182 (1857) (emphasis added).

²⁰⁷ It is true that Justice Smith paid lip service to this language when holding that a manslaughter instruction was properly omitted in a murder trial: "By its own terms, the section applies only when the other provisions of Chapter 97, Title 3 do not." *Hurns v. State*, 616 So. 2d 313, 320 (Miss. 1993). But the court grounded its decision on the fact that "[t]he evidence does not support a finding that Hurns possessed only the lesser degree of culpability covered by the culpable negligence statute." *Hurns*, 616 So. 2d at 321.

²⁰⁸ In *Craig v. State*, the defendant admitted to killing with simple negligence in violation of the aggravated vehicular homicide statute (then punishable by five years imprisonment). 520 So. 2d 487, 491 (Miss. 1988). The court held that

its limiting language, this statute has broad application to unintended criminal homicides.

Though ignored by courts and prosecutors, the Mississippi statute that is today thought to criminalize *voluntary* manslaughter was apparently also conceived originally to apply to certain unintended killings. The Penitentiary Code of 1839 defined manslaughter as a killing "without design" in a heat of passion but either in a cruel or unusual manner or by use of a dangerous weapon.²⁰⁹ These probably covered hot-blooded, but intentional, killings without premeditation. The 1839 laws also criminalized "*involuntary* killing of another, by any weapon, or by means neither cruel or unusual, in the heat of passion" not otherwise declared to be excusable.²¹⁰ This probably was meant to cover hot-blooded unintentional killings with weapons. The generous excuse statute preempted much of the statute for involuntary, barehanded killings, but the manslaughter statute still applied to such killings when provocation was not sufficient as a matter of law.²¹¹ In 1857 these statutes were consolidated and amended, substituting the new requirement of "without malice" for the old requirements of "without design" and "involuntary."²¹²

The reasons for this subtle change are not clear. It is possible the change was intended merely to consolidate two similar statutes and was not intended to change the elements. The legislature in 1857, as in 1839, probably still meant to criminalize all homicides that resulted from fights in which the defendant employed a dangerous weapon or killed barehanded but in a cruel and unusual manner. The substitution of the requirement of "without malice" was thus meant to distinguish

defendant's negligence did not rise to the culpability level required for manslaughter. *Craig*, 520 So. 2d at 492-93. The court might have pointed out, however, that if section 97-3-27 codifies a doctrine of felony manslaughter, then defendant's admission on appeal might have supported a conviction properly indicted under that statute. *See supra* note 114.

²⁰⁹ PENITENTIARY CODE, *supra* note 67, tit. 3, §§ 10-12. *See supra* notes 85-86.

²¹⁰ PENITENTIARY CODE, *supra* note 67, tit. 3, § 18 (emphasis added).

²¹¹ *Id.* A close reading of the statutes together might permit a prosecution for involuntary, barehanded, non-cruel homicide where there was insufficient provocation.

²¹² *See supra* note 123 and accompanying text.

such killings from intentional murder, which had itself been redefined from "premeditated design" in 1839 to "deliberate design" in 1857.²¹³ Specifying that manslaughter occur "without malice" probably signaled nothing more than the absence of the need to prove the deliberate design that would make a killing murder. Accordingly, all killings by such methods constituted either murder or manslaughter except when they were committed under those circumstances that constituted a justification or excuse.²¹⁴

The defense of justification was established by necessary self defense.²¹⁵ The defense of excuse was established narrowly when a defendant killed without intent ("by accident and misfortune") but did so in a provoked heat of passion or in an affray "without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner."²¹⁶

The chief distinction in 1857 was still between methods of killing. On the one hand, killings with weapons or in cruel and unusual ways were either murder, when done with deliberate design (premeditated design or malice), or manslaughter, when committed in a heat of passion during a provoked rage or during spontaneous fights.²¹⁷ Intent to kill was apparently not important for homicides committed with weapons, and there was no statutory defense of accident or excuse for such killings.²¹⁸ On the other hand, for barehanded killings intent was crucial, and the defense of accident and misfortune was available.²¹⁹

The statute thus broadly criminalized killings that were prohibited under the old English manslaughter act (a counterpart of which had previously been codified in Mississippi) that

²¹³ See *supra* note 106 and accompanying text.

²¹⁴ See *supra* note 197 and accompanying text (discussing origin of defense in 1839).

²¹⁵ REV. CODE MISS. ch. 64, § 34, art. 168 (1857). This was included among other justifications and also repeated in the elements of manslaughter. *Id.* arts. 174, 176.

²¹⁶ *Id.* art. 169.

²¹⁷ *Id.* arts. 165, 169, 174, 176.

²¹⁸ See generally *id.* § 34.

²¹⁹ PENITENTIARY CODE, *supra* note 67, tit. 2, § 3(2).

prohibited killings with daggers and swords.²²⁰ The generous excuse for provoked barehanded killings dispensed with the common law doctrine, still followed by many states, that death resulting from a criminal assault was manslaughter.²²¹ Excusable homicide explicitly extended to *accidental* killings resulting from lawful acts and to *accidental* killings resulting from provoked heat of passion or sudden combat (without undue advantage, dangerous weapon, or cruel or unusual manner). Killings by "accident or misadventure" but in an unlawful manner, or without provocation, or during combat but with a weapon were not excused. Whether an assailant meant to kill, wound, or merely frighten in the midst of a fight became legally unimportant. The elimination of special requirements of intent in hot-blooded killings anticipated sociological observations made over a century later that even the most notoriously intentional homicides express deeply conflicted motivations.²²²

There were further changes to this text after 1857 as

²²⁰ See *supra* notes 32 and 56.

²²¹ Although Coke could be read as suggesting that any death resulting from an unlawful intent to injure was murder, see generally 3 STEPHEN, *supra* note 11, at 57, by the eighteenth century, death resulting from an unlawful act not amounting to felony was manslaughter, and even a death that might otherwise be counted as murder could be "alleviated" to manslaughter when it was the involuntary consequence of an unlawful act. See 4 BLACKSTONE, *supra* note 8, at *201. "[I]t is almost universally held, as a specific instance of unlawful-act manslaughter, that one is guilty of involuntary manslaughter who intentionally inflicts bodily harm upon another person, as by a moderate blow with his fist, thereby causing an unintended and unforeseeable death to the victim" LAFAVE, *supra* note 10, § 7.13(d), at 734. LaFave criticizes the soundness of this doctrine. *Id.* at 735. See generally 3 STEPHEN, *supra* note 11, at 57.

²²² JACK KATZ, SEDUCTIONS OF CRIME 33 (1988) (providing examples of deliberate killings where the killers wanted to achieve transcendent goals other than or in addition to the death of the victim).

My construction of the 1839 statute assumes that the word "or" provides an alternative only for provocation and combat and does not introduce a new phrase. This reading is supported, circularly, by my reasoning about the intent of the drafters. It is also supported by a close reading of the same grammatical form employed in the preceding section. See PENITENTIARY CODE, *supra* note 67, tit. 2, § 3(1). To illustrate, "[B]y accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." *Id.* The prepositional phrases following "means" apply generally and modify also the correcting of the child or servant. See 4 BLACKSTONE, *supra* note 8, at *182.

follows:

- *1857 text*—“[B]y accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation; or upon any sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.”²²³
- *Recodified text in 1871-1892*—“[B]y accident and misfortune, in the heat of passion . . . , or upon any sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.”²²⁴
- *Recodified text 1892*—“(b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation; (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.”²²⁵

These changes to the text were probably meant to clarify the language and not to change the substantive legal requirements. In *Wood v. State*, the supreme court construed the law of excusable homicide under the 1880 Code, disregarded the disjunctive “or” in the statute, and assumed that excusable homicide required the absence of a dangerous weapon for both provoked and sudden combat killings.²²⁶ In that case the victim allegedly called the defendant a “damn liar” and struck him with a board.²²⁷ The defendant then stabbed the victim.²²⁸ The defendant requested an instruction that killing was excusable when by accident and misfortune, in a heat of passion, and upon a sudden quarrel.²²⁹ The court affirmed the denial of the

²²³ PENITENTIARY CODE, *supra* note 67, tit. 2, § 3(2). The 1857 Code removed the section numbers and added the word “the” before “heat of passion.” REV. CODE MISS. ch. 64, § 34, art. 169 (1857).

²²⁴ REV. CODE MISS. ch. 77, § 2879 (1880) (emphasis added); REV. CODE MISS. ch. 58, art. 21, § 2632 (1871).

²²⁵ MISS. CODE ANN. ch. 29, § 1153 (1892) (codified as amended at MISS. CODE ANN. § 97-3-17 (2000)).

²²⁶ 64 Miss. 761, 775 (1887).

²²⁷ *Wood*, 64 Miss. at 764.

²²⁸ *Id.*

²²⁹ *Id.* at 764-65.

instruction maintaining that it "would not be correct in any case where death resulted from the use of a deadly weapon."²³⁰

Whether or not this approach corresponded to the original purposes of the legislature, the supreme court in later cases relied heavily on the phrasing of the revised statute and the absence of language of "without a dangerous weapon" in subsection (b).²³¹ It has not yet similarly relied on the corresponding absence of language of "accident and misfortune" in subsection (c) but has instead recognized the general availability of subsection (a) (accidental killings during lawful acts) to killings with weapons.²³² In a 1996 case where an estranged husband shot and killed his wife and later claimed they were fighting for possession of his handgun, the court reversed a murder conviction where requested instructions on accident and misfortune were omitted.²³³ Although the court needed only to decide that an accidental killing during a lawful act was excusable homicide, which had been settled law since 1839, it proclaimed far more broadly from "clear language of the statute" that "the only time a homicide cannot be excusable when a dangerous weapon is used is when it takes place during sudden combat."²³⁴

²³⁰ *Id.* at 775. *But see* *Miller v. State*, 677 So. 2d 726, 730 (Miss. 1996) (questioning and distinguishing *Wood* decision).

²³¹ *See infra* notes 233-39 and accompanying text.

²³² At common law the accidental killing with a weapon was, of course, available as a defense when the person discharging the weapon was engaged in lawful conduct at the time. 4 BLACKSTONE, *supra* note 8, at *182. This was certainly covered by the general excusable homicide defense of accident and misfortune that applied to a "lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." MISS. CODE ANN. § 97-3-17(a) (2000).

²³³ *Miller*, 677 So. 2d at 732; *accord* *Taylor v. State*, 597 So. 2d 192 (Miss. 1992) (reversing murder conviction where defendant claimed gun discharged accidentally after struggle for possession but was denied accident instruction); *Scott v. State*, 446 So. 2d 580, 583 (Miss. 1984) (holding failure to give accident instruction was reversible error where gun discharged during scuffle and instruction on excuse limited to sudden combat). Oddly, the court in *Miller* held that the omission of the self defense and accident instruction, which may have been more relevant to the claimed need to fight for possession of the gun, was not reversible error because the instruction (not quoted) was confusing. *Miller*, 677 So. 2d at 732.

²³⁴ *Miller*, 677 So. 2d at 730.

A few other cases suggest the continuing validity of the rule that a killing (with or without a dangerous weapon) during an unlawful act is manslaughter.²³⁵ In such cases the omission of a defense instruction on accidental homicide is proper, but in general, accident and misfortune provides a defense in shooting deaths as in any other kind of case, and the omission of appropriate instructions is reversible error. Accordingly, the prosecution may have to refute a claim of accident and misfortune in order to prove manslaughter.²³⁶

The current confusion is expressed in a model instruction that provides for a complete defense where the jury finds the defendant "without any design or deliberation to cause the death of [deceased's name] had possession of a pistol, and in the heat of passion in a struggle between [deceased's name] and [defendant's name], the fatal shot was fired accidentally and through misfortune, upon any sudden and sufficient provocation."²³⁷

Aggravated DUI. Unintended killing constitutes aggravated DUI when the defendant satisfies the elements of driving while intoxicated and causes death in a negligent manner.²³⁸

²³⁵ The court affirmed a manslaughter conviction in a case where the defendant claimed he accidentally shot and killed his wife while attempting to commit suicide. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744, 755 (Miss. 1996). The court reasoned that the defense of accident was not available where the defendant killed during the commission of an unlawful act (as suicide was a crime at common law). *Id.* at 753; *see also* *Thibodeaux v. State*, 652 So. 2d 153, 173-74 (Miss. 1995) (holding accident instruction properly refused where defendant claimed his gun accidentally discharged while he was in the process of headlighting deer). *Thibodeaux* did not claim heat of passion as a defense and the court reasoned, "The statute defining excusable homicide does not extend to homicide committed in the course of an unlawful act [headlighting deer] nor to homicide committed with a deadly weapon." *Thibodeaux*, 652 So. 2d at 167 (alteration in original).

²³⁶ MODEL JURY INSTRUCTIONS, *supra* note 92, § 8:15 (providing broad instruction for accidental shooting without intent). This instruction is based on *Scott v. State*, 446 So. 2d 580 (Miss. 1984).

²³⁷ MODEL JURY INSTRUCTIONS, *supra* note 92, § 8:17 (providing instruction for accidental shooting during struggle). This model instruction is far more confusing than the requested instruction that the court criticized in *Miller*, 677 So. 2d at 732.

²³⁸ *See supra* text accompanying notes 180-87.

II. UNINTENTIONAL CRIMINAL HOMICIDE IN OTHER JURISDICTIONS

A. States and Federal Government

Today most states and the federal government recognize some form of extreme recklessness as providing a sufficient culpable mental state for murder.²³⁹ Statutory schemes vary in defining such murders as killings with "malice"²⁴⁰ or "im-

²³⁹ Alan C. Michaels remarks that "[m]ost states punish certain unintended killings as murder." Alan C. Michaels, Note, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 810 (1985). As of 1980 revised murder statutes or proposed revisions in sixteen jurisdictions omitted explicit treatment of some form of unintentional murder. See MODEL PENAL CODE § 210.2 cmt. 4, at 26 (1980). Through subsequent judicial construction or legislative amendment, some of those states imposed murder liability on unintended killings. See Louis B. Butterfield, *Maine's Unintentional Murder Statute: Depraved Indifference on Trial*, 40 ME. L. REV. 411, 430-34 (1988) (discussing judicial construction of Maine depraved indifference murder statute as not having a subjective culpable state of mind element). For an example of a state statute limiting murder to intentional killings, see OHIO REV. CODE ANN. § 2903.02 (Anderson 1996) (defining murder as "purposely caus[ing] the death of another"). Oregon classifies extreme recklessness killings in general as manslaughter in the first degree, OR. REV. STAT. § 163.118(1)(a) (2001) (defining manslaughter in the first degree as killing "recklessly under circumstances manifesting extreme indifference to the value of human life"), but elevates this crime to murder when the victim is under fourteen or a dependent person. *Id.* § 163.115(1)(c).

For citations to statutes and collections of cases, see 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 145, at 386-90 (15th ed. 1994 & Supp. 1999); Jeffrey F. Ghent, Annotation, *Validity and Construction of "Extreme Indifference" Murder Statute*, 7 A.L.R. 5TH 758 (1992); Dale R. Agthe, Annotation, *Validity and Construction of Statute Defining Homicide by Conduct Manifesting "Depraved Indifference"*, 25 A.L.R. 4TH 311 (1983); John D. Perovich, Annotation, *What Constitutes "Inimently Dangerous" Act Within Homicide Statute*, 67 A.L.R. 3D 900 (1975); see also Eugene R. Mihizer, *Murder Without Intent: Depraved Heart Murder Under Military Law*, 133 MIL. L. REV. 205 (1991) (examining the origins of depraved indifference murder under military law). For a probing, sustained theoretical defense of punishing crimes of indifference, see Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105 (1996).

²⁴⁰ E.g., 18 U.S.C. § 1111 (2000) ("[M]urder is the unlawful killing of a human being with malice aforethought"); see *United States v. Shaw*, 701 F.2d 367, 392 n.20 (5th Cir. 1983) ("Malice does not require a subjective intent to kill, but may be established by evidence of conduct which is a 'reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'") (quoting *United States v. Black Elk*, 579 F.2d 49, 51 (8th

plied malice,"²⁴¹ and in describing the accompanying mental states as "a depraved mind regardless of human life,' 'an abandoned and malignant heart' and 'a heart regardless of social duty and totally bent on mischief.'"²⁴² More recently, under the influence of the Model Penal Code (discussed in Part II(B)), some states have defined this kind of murder in terms of recklessness and extreme indifference.

A common problem for jurisdictions that treat some unintended killings as murder is distinguishing the culpable mental state required for unintentional murder from that, often characterized as culpable or criminal negligence, required for involuntary manslaughter or other forms of unintentional criminal homicide.²⁴³ In general, extreme recklessness required for murder is said to require a very high degree of risk of death or serious bodily injury²⁴⁴ or a great indifference to the value of human life.²⁴⁵ Jurisdictions are split over whether the defendant must also be subjectively aware of the risk, though schol-

Cir. 1978)); *see also* United States v. Milton, 27 F.3d 203, 206-08 (6th Cir. 1994) (shooting into car established requisite malice); United States v. Hinkle, 487 F.2d 1205, 1207 (D.C. Cir. 1973) (proposing instruction defining malice as "a state of mind showing a heart that is without regard for the life and safety of others").

²⁴¹ *E.g.*, CAL. PENAL CODE § 187 (West 1999) (defining murder as "killing . . . with malice"); *id.* § 188 ("[Malice] is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.").

²⁴² Lloyd L. Weinreb, *Homicide: Legal Aspects*, in 2 ENCYCLOPEDIA OF CRIME & JUSTICE 855, 859 (Sanford H. Kadish ed., 1983); *see also* DRESSLER, *supra* note 10, § 31.05, at 512-14; LAFAVE, *supra* note 10, § 7.4, at 666-70.

²⁴³ *See generally* DRESSLER, *supra* note 10, § 31.05[B], at 514 ("There is no common law bright line between 'negligence' and 'recklessness,' and there is no universally accepted common law definition of 'recklessness.' Consequently, the line between unjustified risk-taking that constitutes involuntary manslaughter and that which constitutes murder has never been drawn with clarity.") (footnotes omitted); Michaels, *supra* note 239, at 786 ("Despite widespread agreement that certain unintended killings should be treated as murder, states continue to struggle in search of a satisfactory means of distinguishing such killings from manslaughter."). *See generally* Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN'S L. REV. 429 (1990) (discussing New York cases); Leo M. Romero, *Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico*, 20 N.M. L. REV. 55 (1990) (discussing New Mexico cases).

²⁴⁴ LAFAVE, *supra* note 10, § 7.4, at 666.

²⁴⁵ DRESSLER, *supra* note 10, § 31.05[A][2], at 513.

ars express a preference for actual subjective awareness.²⁴⁶

B. Model Penal Code

The American Law Institute began work on the Model Penal Code in 1952. Adopted finally in 1962, the code influenced revisions of criminal statutes in at least thirty-four states.²⁴⁷

The adjacent states of Alabama, Tennessee, and Arkansas have been significantly influenced by the Model Penal Code in revising their homicide statutes.²⁴⁸ But Mississippi homicide laws have not been amended in the wake of the Model Penal Code, nor has the Model Penal Code had much other effect on criminal jurisprudence in the state. Exceptions are the aggravating and mitigating circumstances for capital punishment, which Mississippi borrowed from the Model Penal Code,²⁴⁹ and the crimes of simple and aggravated assault.²⁵⁰

1. Murder

The Model Penal Code defines murder to include killings done purposely or knowingly.²⁵¹ Murder also includes certain unintentional killings: "[C]riminal homicide constitutes murder when . . . it is committed recklessly under circumstances mani-

²⁴⁶ *Id.* § 31.05[B], at 514; LAFAVE, *supra* note 10, § 7.4, at 669-70.

²⁴⁷ See MODEL PENAL CODE Foreword (1980). For cases construing state statutes influenced by the code, see Ghent, *supra* note 239. In revising their criminal laws, some states adopted the Model Penal Code's formulation of extreme recklessness while others retained older common law language. See MODEL PENAL CODE § 210.2 cmt. 4.

²⁴⁸ See ALA. CODE §§ 13A-6-2 to -4 (1994) (addressing murder, manslaughter, and criminally negligent homicide); ARK. CODE ANN. §§ 5-10-102(a)(2), -103, -104(a)(3), -105(b)(1) (Michie 1997) (providing relevant statutes regarding first degree murder, second degree murder, manslaughter, and negligent homicide); TENN. CODE ANN. §§ 39-11-302, -13-210(1), -13-212, -13-215 (1997) (listing definitions and relevant statutes for second degree murder, criminally negligent homicide, and reckless homicide).

²⁴⁹ Compare MISS. CODE ANN. § 99-19-101 (2000), with MODEL PENAL CODE § 210.6. For a discussion of the relevant section of the Mississippi Code, see *supra* text accompanying notes 140-46.

²⁵⁰ Compare MISS. CODE ANN. § 97-3-7(1), (2), with MODEL PENAL CODE § 211.1.

²⁵¹ MODEL PENAL CODE § 210.2(1)(a).

festing extreme indifference to the value of human life."²⁵² The code's drafters, assuming that the common law doctrine of implied malice embraced certain unintentional killings, generalized that "the essential concept was one of extreme recklessness regarding homicidal risk."²⁵³ The code requires actual subjective awareness of risk in its definition of the operative mental state, "recklessly," by stating: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."²⁵⁴ Hence, "inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder."²⁵⁵

The Model Penal Code also defines reckless conduct to impose the objective requirement that the risktaking deviate significantly from the community's standards: "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."²⁵⁶ The drafters settled their disagreements over felony murder by inserting into the elements of extreme recklessness murder an evidentiary rule permitting an

²⁵² *Id.* § 210.2(1)(b).

²⁵³ *Id.* § 210.2 cmt. 1, at 15. The drafters deployed authority tendentiously to avoid confronting the fact that murder liability for unintended killings was becoming controversial. They cited and quoted Commonwealth laws generously but only mentioned in passing the prevailing European preference for intent. *Id.* cmt. 4, at 23-24. They also ignored English authority except for a Royal Commission report in conflict with the law as written. *Id.* cmt. 4, at 25 n.51.

The drafters overlooked older authority requiring purpose or intent for murder, e.g., CRIMINAL CODE OF OHIO WITH FORMS AND PRECEDENTS FOR INDICTMENTS § 6810 (Moses F. Wilson ed., 1883) (defining murder as "purposely and maliciously" killing), and were surprised by recent legislation that failed to extend murder to unintended killings. MODEL PENAL CODE § 210.2 cmt. 4, at 26.

²⁵⁴ MODEL PENAL CODE § 2.02(2)(c) (1985); cf. *id.* 2.02(2)(c) cmt. 3, at 236 ("As the Code uses the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty").

²⁵⁵ *Id.* § 210.2 cmt. 4, at 27-28 (1980).

²⁵⁶ *Id.* § 2.02(2)(c) (1985). The drafters had some difficulty in finding words to describe how substantial and unjustifiable the risk needed to be. See *id.* cmt. 3, at 237 n.15.

inference of extreme recklessness when the defendant is committing or attempting to commit certain serious felonies or is fleeing after committing or attempting to commit them.²⁵⁷

2. Manslaughter

The Model Penal Code defines its version of involuntary manslaughter as criminal homicide "committed recklessly."²⁵⁸ The drafters recognized that, due to the definition of "recklessly," this represented a substantial innovation, both requiring the creation of a particularly high degree of risk and eliminating "all forms of negligence, in the sense of inadvertent risk creation."²⁵⁹

3. Negligent homicide

Recognizing that the code's definition of manslaughter excludes cases of unconscious risktaking that were widely punished as manslaughter at common law,²⁶⁰ the Model Penal Code proposes a new crime of negligent homicide to punish killings "committed negligently."²⁶¹ The code's definition of negligence does not require actual awareness of risk but denotes conduct that is more extreme and blameworthy than civil negligence. It requires that the risk of which the person "should be aware" is both "a substantial and unjustifiable risk" and that the risk be of "such nature and degree that the actor's failure to perceive it . . . involves a gross deviation from the standard of care that a reasonable person would observe."²⁶²

²⁵⁷ *Id.* § 210.2(1)(b) (1980) (listing felonies as "robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape").

²⁵⁸ *Id.* § 210.3(1)(a).

²⁵⁹ *Id.* § 210.3 cmt. 3, at 49. Manslaughter under the Model Penal Code "refines the traditional definition of manslaughter by demanding proof of conscious disregard of perceived homicidal risk." *Id.* § 210.3 cmt. 4, at 53

²⁶⁰ *Id.* § 210.4 cmt. 1, at 81.

²⁶¹ *Id.* § 210.4(2).

²⁶² *Id.* § 2.02(2)(d) (1985).

4. Summary

The Model Penal Code punishes unintended killings as murder, manslaughter, or negligent homicide when the death results from the disregard of a substantial and unjustifiable risk of death. The risktaking must evidence a gross deviation from the standard of care followed by law-abiding persons (for murder and manslaughter) or by reasonably prudent persons (for negligent homicide). If the actor is not aware of the risk, the liability is limited to negligent homicide. If the actor is aware of the risk, liability exists for manslaughter. If the actor is aware of the risk and also manifests extreme disregard for the value of human life, the homicide is murder.

The appeal of the Model Penal Code's ingenious drafting obscures two pervasive problems. First, its emphasis on subjective awareness or risk has limited consequences in practice because the factfinder must infer such awareness from objective aspects of conduct. In making judgments about awareness the factfinder may be influenced by factors ranging from the actor's age to his or her race. Defining elements of a crime in subjective terms appears to promote justice by linking the severity of punishment to the actor's mental state.²⁶³ But because of judicial deference to factfinding, it also effectively shields convictions from appellate scrutiny for consistency.

Second, the code's emphasis on awareness may fail to describe appropriately the psychological dynamics involved in risktaking. Many deaths result from high risk conduct where the actors claimed not to anticipate the fatal results yet were motivated by the thrill of risk of injury or death. The difficulty in determining whether the actor was "aware" of a risk and "consciously disregarded it" may not be a problem of evidence as much as a problem of recognizing that "awareness" does not correspond to the wilful denial of responsibility often displayed in the cases.

²⁶³ This is not identified as a purpose of criminal legislation by the code, *cf.* *id.* § 1.02, but may be implied by the references to differences between serious and minor offenses, *id.* § 1.02(1)(e), and to the differentiation among offenders "with a view to a just individualization in their treatment." *Id.* § 1.02(2)(e).

III. MENS REA FOR UNINTENTIONAL MURDER AND MANSLAUGHTER

A. Depraved Heart Murder

1. Language of the Statute

The statute governing unintended murder qualifies both the act and the accompanying mens rea. First, the killing must occur "in the commission of an act eminently dangerous to others." Second, the act must be one "evincing a depraved heart, regardless of human life."²⁶⁴ The statute makes it explicit that no intent or premeditation is required by adding "although without any premeditated design to effect the death of any particular individual."²⁶⁵

Eminently dangerous. No opinions define the meaning of an "act eminently dangerous," and the court has never held that it is error to instruct the jury in language drawn from the statute without further clarification as is routinely done.²⁶⁶ The court has approved an instruction on deliberate design murder employing the statutory language over an objection that the language stated "an abstract legal definition."²⁶⁷ But the meaning of an act "eminently dangerous" may be less obvious to a jury than "deliberate design."

The meaning of such an act is certainly far from obvious to

²⁶⁴ MISS. CODE ANN. § 97-3-19(1)(b) (2000).

²⁶⁵ *Id.* Absence of intent or premeditation was meant merely to distinguish the requirements for depraved heart murder, corresponding to the category of implied malice, from those under the preceding subsection, which originally required "premeditated design." See *supra* note 109. It was not meant originally to impose an element. Nevertheless, early authority construed the statute not to apply to deliberate design killings. See *infra* note 281.

²⁶⁶ See MODEL JURY INSTRUCTIONS, *supra* note 92, § 8:4. The subsequent "model" instruction that creates a crime of murder for killing a victim while the deceased rather than the accused "was committing an act extremely dangerous to others and evidencing a depraved heart, regardless of human life; and [w]ithout any premeditated design" is a misreading of section 97-3-19(b). *Id.* § 8:5 There is no authority for the crime defined by the instruction, and giving the instruction would be reversible error.

²⁶⁷ *Dobbs v. State*, 29 So. 2d 84, 85 (Miss. 1947), *overruled on other grounds* by *Flowers v. State*, 473 So. 2d 164, 166 (Miss. 1985).

the court. The plain meaning of the constituent words of the statute is obscure because the statute possibly employed the wrong words. "Eminently" may be a malapropism for "imminently." While "eminently" means famously or conspicuously, it also operates generally as an intensifier like "especially" or "notably."²⁶⁸ "Imminently," in contrast, connotes the quality of being immediately impending or threatening.²⁶⁹

An "eminently dangerous" act would be one that is openly and widely perceived as dangerous. An "imminently dangerous" act would be one that presents an immediate risk of harm. Classic examples of implied malice, such as shooting into a crowded room and throwing a heavy object from a roof in London onto a crowded street²⁷⁰ represent acts that are no doubt both eminently and imminently dangerous. But in many cases the immediacy of danger does not coincide with its obviousness. Giving a small child access to a firearm might be eminently dangerous yet present no imminent risk of harm. Selling improperly stored meat might be imminently dangerous but not eminently so.

"Eminently" may be exactly what the legislature meant, but more recent legal authorities render the term of art as "imminently dangerous."²⁷¹ A number of opinions by the su-

²⁶⁸ These were the fixed meanings of "eminently" by the eighteenth century. See 1 OXFORD ENGLISH DICTIONARY 853 (compact ed. 1971). This source also gives as the fifth meaning for "eminently": "Of peril, danger: Imminently, urgently," citing two seventeenth century sources that are ambiguous and may have either meant eminently in its other meanings or may have misspelled it. *Id.* It also notes under the sixth meaning for "eminent" that "eminent" is confused with "imminent" and, by implication, wrongly deployed to qualify "danger" in two sources. *Id.* See generally MISS. CODE ANN. § 1-3-65 (1998) ("All words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning.").

²⁶⁹ 1 OXFORD ENGLISH DICTIONARY 1380. This source also notes "imminent" is employed in error for "eminent" and "immanent." *Id.*

²⁷⁰ 4 BLACKSTONE, *supra* note 8, at *192. "[C]oolly discharging a gun among a multitude of people" was, despite almost all current discussions, an example of *express* malice for Blackstone. *Id.* at *200. Blackstone's authority for the latter is problematic. He cited COKE, *supra* note 8, at *57 (maintaining without authority that it was murder for a person to throw a stone over a wall intending to scare people coming from a sermon, "for he had an ill intent, though that intent extended not to death").

²⁷¹ BLACK'S LAW DICTIONARY 752 (7th ed. 1999) (defining "imminently danger-

preme court tacitly correct the language of the statute to require an act imminently dangerous. Justice Hawkins concluded: "My guess is that the authors meant 'imminently' rather than 'eminently' dangerous to others. 'Imminently' suggests something that is likely to occur at any moment. The word 'eminently,' however, has been in this code section at least since 1848."²⁷² The actual meaning of the words has not affected the development of the law.

Intent to kill. The supreme court has repeatedly held in the past decade that an act eminently dangerous to others and evincing a depraved heart regardless of human life includes intentional homicide.²⁷³ In other words, the state does not have to prove the absence of "premeditated design," and homicides under section 97-3-19(a) with "deliberate design" and unintended killings covered by section 97-3-19(b) are not mutually exclusive categories. Instead, the former are included within the latter, for "[a]s a matter of common sense, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, regardless of human life."²⁷⁴ Accordingly, the supreme court affirmed a murder conviction for a stabbing death where the jury was instructed both on deliberate design and depraved heart murder,²⁷⁵ and the court of appeals affirmed a murder

ous" as "reasonably certain to place life and limb in peril"). This source has no entry for "eminently dangerous." See also *infra* notes 493, 496 for a discussion of the Florida and Oklahoma statutes.

²⁷² *Windham v. State*, 602 So. 2d 798, 804 n.1 (Miss. 1992) (Hawkins, P.J., concurring). Justice Robertson agreed with this interpretation only "in part" because he believed "the phrase [also] imports a danger that is *clear and present*" *Windham*, 602 So. 2d at 808 (Robertson, J., concurring).

²⁷³ *Mallett v. State*, 606 So. 2d 1092, 1095 (Miss. 1992) (holding that homicide may be prosecuted simultaneously as both deliberate design and depraved heart murder). This recent development was controversial. See *infra* text accompanying notes 282-90.

²⁷⁴ *Catchings v. State*, 684 So. 2d 591, 599 (Miss. 1996) (quoting *Mallett*, 606 So. 2d at 1095 (holding there was no error in instructing on depraved heart where defendant was indicted for deliberate design homicide)); see also *Hurns v. State*, 616 So. 2d 313, 321 (Miss. 1993) (noting that depraved heart statute subsumes the deliberate design statute).

²⁷⁵ *Outlaw v. State*, 1999-KA-00461-SCT, ¶¶ 6-9, 797 So. 2d 918, 920 (Miss.

conviction obtained with a depraved heart instruction in a case where the defendant apparently shot the victim with intent to kill.²⁷⁶

Malice. Older cases held that all murder requires malice, notwithstanding the absence of that term from the statute, and that the failure to instruct on malice was reversible error.²⁷⁷ Moreover, a statute permits (but does not require) all murder indictments to charge malice.²⁷⁸ But malice has come to denote the mens rea required for deliberate design murder; and "malice aforethought," "deliberate design," and "premeditated design" have become synonyms.²⁷⁹ Where a malice instruction is given, older authority suggests that it is "unnecessary and unwise to attempt to define malice."²⁸⁰ But because malice does not mean what an uninstructed reasonable person would

2001).

²⁷⁶ *Ruttley v. State*, 97-KA-00783-COA, ¶¶ 18-17, 27, 746 So. 2d 872, 878-79, 881 (Miss. Ct. App. 1998). Justice Robertson proclaimed, "Subsection (1)(b) 'eminently dangerous' murder engulfs and subsumes Subsection (1)(a) 'deliberate design' murder." *Windham*, 602 So. 2d at 808 (Robertson, J., concurring). He speculated that there were no reported convictions of deliberate design murder that would fail to satisfy the elements of depraved heart murder. *Id.* (Robertson, J., concurring).

²⁷⁷ *Burnett v. State*, 46 So. 248, 249 (Miss. 1908). The facts in *Burnett* involved a fire fight between two groups. *Burnett*, 46 So. at 249. The defendant was accused of shooting through a window and killing the victim. *Id.* He requested an instruction that "malice aforethought is a necessary element in a charge for murder," and the court held that its omission was reversible error. *Id.*

The short opinion is enigmatic. The defendant may have been indicted for deliberate design murder, and the court may have reasoned that a malice instruction was required in such a case, especially where facts might have supported mitigation to manslaughter.

²⁷⁸ MISS. CODE ANN. § 99-7-37 (2000) ("[I]t shall be sufficient to charge in an indictment for murder, that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased."). The omission of this language is not fatal, and an indictment for depraved heart murder in the language of the statute is proper. *Johnson v. State*, 475 So. 2d 1136, 1138-39 (Miss. 1985).

²⁷⁹ "It has long been the case law of this state that malice aforethought, premeditated design, and deliberate design all mean the same thing." *Tran v. State*, 681 So. 2d 514, 517 (Miss. 1996); *Johnson*, 475 So. 2d at 1139; see also *Windham*, 602 So. 2d at 802-03 (citing cases); *Blanks v. State*, 542 So. 2d 222, 227 (Miss. 1989) (citing cases).

²⁸⁰ *Smith v. State*, 114 So. 2d 676, 677 (Miss. 1959) (affirming conviction where trial court did not give instruction defining malice); see also *Dobbins v. State*, 1998-KA-01322-COA, ¶ 10, 766 So. 2d 29, 32 (Miss. Ct. App. 2000) (holding no definition of malice required in instructions).

assume, and because express malice does not apply to depraved heart murder, it would be far better to omit a malice instruction in all murder prosecutions, especially in depraved heart murder cases where it is not required under any name.²⁸¹

Dangerous to others. There is no requirement today that the act dangerous to "others" create risks to more than one person.²⁸² The supreme court has declared: "An act which poses a risk to only one individual and which results in that individual's death may also be deemed depraved heart murder."²⁸³

This proved controversial with two justices taking the position that an act "eminently dangerous to others" was meant to apply only to conduct creating threats of injury to groups. Justice Hawkins relied in part on the plural "others" in protesting the application of this statute to a woman who killed her child.²⁸⁴

But the real concern of the dissenters was not that a risk of injury to one person was less blameworthy. After all, shooting once into a crowded building threatens only one life. Rather, they were alarmed at the reduction of proof this permitted in killings where there was only one victim. As Justice Banks

²⁸¹ A jury instruction in the language of the statute is not erroneous and need not require a finding that the killing be done "with malice aforethought," "feloniously," or "willfully." *Johnson*, 475 So. 2d at 1140.

²⁸² There was considerable older authority that extreme recklessness murder required the creation of risk of death to persons other than the victim. Older cases held that a defendant indicted for deliberate design killing could not be convicted of depraved heart killing even where the proof was overwhelming. *E.g.*, *Gentry v. State*, 45 So. 721, 722 (Miss. 1908) (holding that shooting into wagon was case of depraved heart murder but reversing conviction where killer was indicted for deliberate design killing), *overruled by* *Catchings v. State*, 684 So. 2d 591 (Miss. 1996). *See generally* *Windham*, 602 So. 2d at 802-03 (discussing history of doctrine). However, this doctrine was eventually abandoned. *See* *Fairman v. State*, 513 So. 2d 910, 913-14 (Miss. 1987); *Johnson*, 475 So. 2d at 1139. In *Windham*, two justices suggested returning to the old doctrine. *Windham*, 602 So. 2d at 804 (Hawkins, P.J., concurring); *id.* at 808-09 (Banks, J., dissenting) (protesting that expansive view of depraved heart murder threatened to absorb all voluntary manslaughter).

²⁸³ *Windham*, 602 So. 2d at 802.

²⁸⁴ "How, some may ask, was Clayton's treatment, or neglect, of her baby Anginetta 'eminently dangerous to others?'" *Clayton v. State*, 652 So. 2d 720, 727 (Miss. 1995) (Hawkins, C.J., concurring in part and dissenting in part).

explained, conduct directed at a single individual previously required sufficient evidence to persuade the jury that the actor killed with deliberate design.²⁸⁵ Because no such design or malice is inferred where no specific victim is targeted, Justice Banks reasoned that the depraved heart statute was intended to cover a different category of cases.²⁸⁶ Moreover, the design equated with malice could be negated by the presence of provocation under the circumstances that constitute voluntary manslaughter.²⁸⁷ But such circumstances might not prevent a jury from finding a depraved heart.

While Justice Banks was probably right that the difficulty of inferring malice was a key motive for separately defining murder by reference to acts eminently dangerous to others, he did not persuade the court that the two forms of murder must be considered mutually exclusive. Though Justice Robertson was not concerned that depraved heart murder could preempt mitigation to manslaughter,²⁸⁸ Justices Hawkins and Banks rightly insisted that such preemption might undermine the distinct levels of homicide liability envisaged by the legislature.²⁸⁹ The problem arises because Mississippi authority has long explained mitigation of hot-blooded killings by the theory that provoked impulsive (but intentional) killings do not stem from the cooler, more sedate "deliberate design" required for murder.²⁹⁰ On this theory provocation only negatives intent, not other forms of malice. Because a depraved heart killer need have no intent at all, provocation would not prevent a jury finding of murder. The court's extension of depraved heart murder requires a significant adjustment to the voluntary manslaughter instructions in order to preserve the jury's power to mitigate hot-blooded killings to manslaughter. While the su-

²⁸⁵ *Windham*, 602 So. 2d at 808 (Banks, J., dissenting).

²⁸⁶ *Id.*

²⁸⁷ *E.g.*, *Carter v. State*, 21 So. 2d 404 (Miss. 1945) (stating presence of deliberation and malice is the primary factor making killing murder rather than manslaughter).

²⁸⁸ *Windham*, 602 So. 2d at 808 (Robertson, J., concurring).

²⁸⁹ *Id.* at 805 (Hawkins, P.J., concurring); *id.* at 808-09 (Banks, J., dissenting).

²⁹⁰ See *Russell v. State*, 1999-KA-00566-SCT, ¶¶ 6-12, 789 So. 2d 799, 781-82 (Miss. 2001), discussed *supra* notes 131-33.

preme court has been alerted to this real problem, it has, unfortunately, not yet resolved it.²⁹¹

Depraved heart regardless of human life. The statutory phrase "evincing a depraved heart, regardless of human life," must be included in jury instructions, and its omission is fundamental error.²⁹² Yet the meaning of this element has attracted little separate consideration by the court.²⁹³ Justice Robertson has suggested that the phrase "depraved heart" may have no meaning at all:

I take it that no one will dispute that the phrase must be seen a metaphor, a euphemism, regarding the actor's cognitive, not cardiac, function. I am open to the suggestion otherwise, but I do not see that it says anything of consequence independent of "eminently dangerous to others" and "regardless of human life."²⁹⁴

As previously suggested,²⁹⁵ murder as defined in section 97-3-19(1)(b) was probably meant to capture cases of implied malice—cases where the evidence of motive (malice or hate) was supplied not by direct evidence of deliberate killings but by

²⁹¹ Justice Banks repeated his concern in *Outlaw v. State*, commenting: "It is true . . . that the application of 'depraved heart' murder to circumstances such as these conflicts with 'heat of passion' manslaughter. Unfortunately for [the defendant], this Court approved that conflict in *Windham* . . ." *Outlaw*, 1999-KA-00461-SCT, ¶ 15, 797 So. 2d 918, 921 (Miss. 2001) (citations omitted).

²⁹² *Shaffer v. State*, 93-KA-01197-SCT, ¶¶ 31-33, 740 So. 2d 273, 282 (Miss. 1998) (holding phrase "evincing depraved heart, regardless of human life" identified material element of offense and its omission in jury instruction was reversible error even in absence of objection at trial).

²⁹³ Presiding Justice Hawkins, in arguing against classifying an unintentional killing of an individual as "depraved," remarked, "The dictionary the State furnished me read that 'depraved' means 'debasement, corruption, perversion.'" *Windham*, 602 So. 2d at 805 (Hawkins, P.J., concurring).

In dictum, the court once espoused the "general principle" that where a defendant shoots into a crowd "with a spirit of malignity and utter recklessness of human life" the resulting death is murder "because of the recklessness and willfulness and malignity of the shooting generally." *Gentry v. State*, 45 So. 721, 721 (Miss. 1908). But the court apparently thought it was voicing an uncontroversial doctrine of black letter law rather than defining the meaning of the terms of the statute.

²⁹⁴ *Windham*, 602 So. 2d at 808 (Robertson, J., concurring).

²⁹⁵ See *supra* note 73 and accompanying text.

inferences drawn from the extreme dangerousness of the act, coupled with the actor's disregard of human life. If so, Justice Robertson's speculation seems warranted, and the reference to "depraved heart" probably was meant to state a conclusory characterization of the killer rather than to provide an additional element. It is uncertain whether the element "regardless of human life" means that the killer must have contemplated and disregarded the possible fatal consequences of his or her acts.

2. Cases

Nothing in the depraved heart murder statute distinguishes between methods of killings. Nevertheless, the supreme court has been more receptive to prosecutions where deadly weapons have been used, though it has not consistently permitted an inference of extreme dangerousness from that cause of death alone. While other jurisdictions have approved murder convictions where extremely reckless drivers caused death,²⁹⁶ no case in Mississippi has yet resulted in depraved heart murder liability for a driving fatality. Indeed, as discussed below in part B(2), the court was initially reluctant even to impose culpable negligence manslaughter liability in such cases.

Killings with deadly weapons. With the absorption of deliberate design by depraved heart murder,²⁹⁷ the question arises whether evidence that a death was caused by the discharge of a deadly weapon is sufficient without more to support a conviction of depraved heart murder. In theory, the intentional discharge of a deadly weapon should provide sufficient evidence of a depraved heart because the intentional use of a deadly weapon provides sufficient evidence of malice or deliberate design.²⁹⁸ Even before the merger of deliberate design and

²⁹⁶ See, e.g., *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir. 1984); *Pears v. State*, 672 P.2d 903, 906 (Alaska Ct. App. 1983); *People v. Watson*, 637 P.2d 279, 282 (Cal. 1981); *People v. Gomez*, 478 N.E.2d 759, 762 (N.Y. 1985). See generally H.C. Lind, Annotation, *Homicide by Automobile as Murder*, 21 A.L.R. 3d 116 (1968) (collecting cases).

²⁹⁷ See *supra* notes 273-76 and accompanying text.

²⁹⁸ See *supra* notes 33, 273-76; see also *Outlaw v. State*, 1999-KA-00461-SCT, ¶¶ 6-9, 797 So. 2d 918, 920 (Miss. 2001); *Carter v. State*, 97-KA-00760-SCT, ¶¶

depraved heart murder, the supreme court found that the facts of a typical extreme recklessness case, like shooting into a crowded car with intent to frighten, provided sufficient evidence of deliberate design murder.²⁹⁹ But the supreme court's treatment of the permissible inference of intent is inconsistent. On the one hand, it has emphasized for over 150 years that juries should not be instructed that they should presume or infer malice or deliberate design, and it has held that such instructions constitute reversible error.³⁰⁰ On the other hand, in its readiness to affirm murder convictions where voluntary manslaughter instructions have been omitted, it has gone far towards suggesting that the permissible inference of deliberate design must be countered by compelling evidence of heat of passion or imperfect self defense.³⁰¹ Though this confusion will arise most often in intentional murder cases, it may also arise where a defendant argues both that he did not mean to discharge a weapon and did so while in a heat of passion.

Accordingly, absent mitigation by voluntary manslaughter, deliberate use of a deadly weapon normally provides sufficient evidence of an act eminently dangerous evincing a depraved heart regardless of human life.³⁰² Though the evidence is suf-

19-21, 722 So. 2d 1258, 1265 (Miss. 1998); *Hudson v. State*, 1998-KA-01487-COA, ¶¶ 12-14, 754 So. 2d 582, 585 (Miss. Ct. App. 2000); *Williams v. State*, 98-KA-00536-COA, ¶¶ 9-10, 749 So. 2d 159, 161 (Miss. Ct. App. 1999).

²⁹⁹ *Bruce v. State*, 97-KA-00082-COA, ¶¶ 17-21, 746 So. 2d 901, 905-06 (Miss. 1998) (holding that defendant's act of shooting at car allegedly with intent to frighten one passenger was sufficient to support deliberate design murder conviction where other passenger was killed).

³⁰⁰ *See Tran v. State*, 681 So. 2d 514, 517-18 (Miss. 1996) (holding instruction that "deliberate design may be presumed" from use of deadly weapon was reversible error where facts of shooting were in evidence).

³⁰¹ *See Phillips v. State*, 1999-KA-01276-SCT, ¶¶ 19-20, 794 So. 2d 1034, 1038-39 (Miss. 2001) (holding that trial court properly omitted requested instructions on heat-of-passion and imperfect-self-defense manslaughter where defendant killed unarmed victim with shotgun in course of argument). *But see Tran*, 681 So. 2d at 520 (reversing and remanding for new trial without presumption-of-deliberate-design instruction where defendant fired shotgun in direction of victim but may have had defense or circumstances may have supported mitigation to manslaughter).

³⁰² *E.g.*, *Outlaw*, 1999-KA-00461-SCT, ¶¶ 10-15, 797 So. 2d at 920-21 (finding evidence of stabbing sufficient to support murder verdict where jury instructed on both deliberate design and depraved heart theories); *Roberson v. State*, 257 So. 2d

ficient to support a jury finding, it is nevertheless reversible error to instruct the jury that they may infer a "depraved heart regardless of human life" from the acts causing death.³⁰³

The court has repeatedly held that an unjustified deliberate discharge of a firearm towards or into a crowd of persons is sufficient evidence of murder based on an act eminently dangerous to others and evincing a depraved heart regardless of human life.³⁰⁴ At the same time there is some authority that not every death resulting from a careless or unlawful discharge of a deadly weapon may be criminal homicide of any sort, let alone murder. In *Dixon v. State*, a drunk man fired a handgun

505, 507 (Miss. 1972) (holding judge properly submitted murder charge to jury where defendant shot at occupied building, killing victim, possibly without intent to kill); *Ruttley v. State*, 97-KA-00783-COA, ¶¶ 18-19, 746 So. 2d 872, 878-79 (Miss. Ct. App. 1998) (holding evidence of unprovoked shooting sufficient to support depraved heart murder conviction).

³⁰³ See *supra* note 31.

³⁰⁴ In *Talbert v. State*, the court affirmed the murder conviction and capital sentence of a defendant who shot his pistol once into a passing truck carrying twenty-one African American men, wounding one and killing one. 159 So. 549, 550-51 (Miss. 1935). The court rejected his claims that the killing should be held accidental. *Talbert*, 159 So. at 550-51. It further rejected defendant's suggestion he could be guilty of no crime greater than manslaughter because of an alleged insult to his wife, because this was contradicted by the state's witnesses, creating a fact issue. *Id.* The court also cited cases holding that the use of a deadly weapon raised a presumption of malice. *Id.*

In *Bass v. State*, the defendant left a beer garden after arguing with a man, returned with a pistol, and shot it once into a crowd, killing the victim and wounding the man with whom he had been arguing. 54 So. 2d 259, 260 (Miss. 1951). Tried for murder and manslaughter but convicted of manslaughter, the defendant appealed the murder instruction. *Bass*, 54 So. at 260. The court held that the instruction was proper (not just harmless) and concluded that the evidence was sufficient to sustain a murder conviction on a theory of depraved heart. *Id.* at 260-61 (referring to *Talbert*).

In *Wheeler v. State*, a defendant caused a pistol to fire several times while fighting with police over it. 536 So. 2d 1341, 1342 (Miss. 1988). In affirming the murder conviction, the court stated, "[b]y seizing the officer's gun and firing it (according to the most generous possible interpretation) recklessly and at random, Wheeler certainly engaged in the type of conduct contemplated by § 97-3-19(1)(b)." *Wheeler*, 536 So. 2d at 1344. A narrow majority reversed a capital murder conviction on the ground that there was insufficient evidence that defendant knew the victim was a peace officer. *Id.* at 1343-44; see also *Gentry v. State*, 45 So. 721, 721 (Miss. 1908) (suggesting, in dictum, that evidence of shooting into wagon was sufficient to support depraved heart murder conviction but reversing where statute was not included in indictment).

at the ground, but the bullet struck a tin can, ricocheted, and killed a woman standing nearby.³⁰⁵ Even though the shooting violated three misdemeanor statutes, the court reversed a manslaughter conviction where the trial court had refused to instruct that death must be the natural or probable result.³⁰⁶ It suggested in dictum that to constitute depraved heart murder there must be a close causal connection between the reckless act and the death, and the act must be something more than a legal violation, it must be "essentially evil."³⁰⁷

The cases are flatly inconsistent when the evidence is inconclusive with respect to whether a firearm was voluntarily discharged or deliberately aimed towards a person or group of persons. Thus the supreme court affirmed a murder conviction where a defendant recklessly handled a handgun, pointed it at a victim, and fired it.³⁰⁸ According to witnesses, although the defendant had been warned of the danger of the weapon, he made a statement that somebody might get shot, yet said immediately before firing that the gun "ain't loaded."³⁰⁹ Though the court remarked that "we would be better satisfied had the conviction been for manslaughter," it held that the evidence was sufficient for murder: "The evidence showed, and the jury manifestly believed it, that [the defendant] was indifferent as to the consequences of his acts, and disregardful of the safety of others, and did not care what the consequences were."³¹⁰

This would seem to support the conclusion that the creation of risks evidenced by the discharge of a handgun at point blank range, the playing of "Russian roulette," or shooting over someone's head would provide sufficient evidence to support a jury verdict of depraved heart murder.³¹¹ In a well known Pennsylvania case, a seventeen-year-old boy shot a friend, believing that the single armed chamber in a revolver was not in firing position. When the gun fired, he proclaimed, "Gee,

³⁰⁵ 61 So. 423, 423 (Miss. 1913).

³⁰⁶ *Dixon*, 61 So. 2d at 423.

³⁰⁷ *Id.*

³⁰⁸ *Jones v. State*, 152 So. 879, 880 (Miss. 1934).

³⁰⁹ *Jones*, 152 So. at 880.

³¹⁰ *Id.*

³¹¹ See generally LAFAVE, *supra* note 10, § 7.1(a), at 668 (discussing cases).

Kid, I'm sorry."³¹² The Pennsylvania Supreme Court affirmed a murder conviction finding that the defendant's conduct exhibited "gross recklessness for which he must reasonably anticipate that death to another is likely to result."³¹³ Such facts probably also support extreme recklessness murder under the Model Penal Code.³¹⁴

Nevertheless, one Mississippi Supreme Court decision suggests that a point blank shooting may not provide sufficient evidence of depraved heart murder. In *Tait v. State*, a defendant cocked a handgun, held it to a friend's head, and the gun went off while the two were "joking around and horseplaying."³¹⁵ Witnesses summoned police, and when the police arrived, the defendant was holding the victim in his arms, sobbing "I killed him. Oh, my God, I killed him. I shot him."³¹⁶ Though the defendant did not testify or request an involuntary manslaughter instruction, the court held the evidence insufficient as a matter of law to support a jury verdict of depraved heart murder, and it rendered a verdict of manslaughter.³¹⁷

The court conceded that the expansion of depraved heart

³¹² Commonwealth v. Malone, 47 A.2d 445, 447 (Pa. 1996).

³¹³ *Malone*, 47 A.2d at 447. Malone testified that he had no intention of killing the victim, with whom he was living at the time. *Id.* He claimed that he armed the chamber to the right of the firing position and did not expect it to fire. *Id.* The facts stated in the opinion may less readily support a finding of extreme recklessness than those imputed to the case by Joshua Dressler, who claims the defendant spun the firing chamber before firing. DRESSLER, *supra* note 10, at 31.05[A][2], at 513 n.98; see also *People v. Roe*, 542 N.E.2d 610, 612-14 (N.Y. 1989) (affirming depraved indifference murder conviction for "police roulette" killing where defendant pulled trigger, shooting victim); cf. *Commonwealth v. Atencio*, 189 N.E.2d 223, 224-25 (Mass. 1963) (affirming manslaughter conviction for "Russian roulette" killing where victim pulled the trigger).

³¹⁴ The Model Penal Code identified *Malone* as one example where the Code "would permit a jury to reach the same conclusion." MODEL PENAL CODE § 210.2 cmt. 4, at 23 (1985). The drafters may not have appreciated that, if the defendant's testimony was credible, he not only lacked intent to kill but also lacked the awareness of risk required for recklessness.

³¹⁵ 669 So. 2d at 85, 87 (Miss. 1996) (en banc).

³¹⁶ *Tait*, 669 So. 2d at 87.

³¹⁷ *Id.* at 91. Chief Justice Dan M. Lee concurred in the result only, *id.*, while Justice McRae dissented from entry of the manslaughter conviction, arguing that the entry of judgment exceeded the court's limited appellate jurisdiction as conferred under the state constitution. *Id.* at 91-92 (McRae, J., dissenting).

murder to reckless acts directed towards one person "would seem to include the defendant's act of pointing a gun at the victim and pulling the trigger."³¹⁸ Nevertheless, it placed extraordinary weight on the evidence of the defendant's remorse to conclude that the shooting was accidental: "Tait's conduct of falling to the ground and crying following the shooting could be considered as consistent with an accident. In addition, there was no testimony indicating that the gun was the defendant's, that he knew it was loaded, or that he pulled the trigger."³¹⁹

This extraordinary characterization of the evidence overlooked the defendant's own admission that, "I killed him . . . I shot him" and his concomitant failure to protest that the killing was an accident. The court also did not acknowledge the relevance of the presumption that actors intend the natural and probable consequences of their acts. The most troubling aspect of the case, however, was the court's assumption that an accidental shooting was incompatible with depraved heart murder. In making this assumption the court confused the mental state of intent required for deliberate design murder, which is negated by genuine accident, and the mental state required for depraved heart murder, which has never required intent to kill, and which, therefore, should not be negated by accident.

The question in depraved heart killings is not whether the death was accidental or unintended, but rather the degree of recklessness that caused the accident. Accepting the facts as the court described them, the defendant held a revolver to the victim's head, did not determine whether the gun was loaded, cocked the hammer, and after the gun fired in the presence of witnesses, expressed surprise and remorse.³²⁰ To find such evidence insufficient would eliminate depraved heart murder in most, if not all, cases that do not contain evidence of hostile motive satisfying the traditional criteria for deliberate design murder.

The holding in *Tait* is accordingly inconsistent with the legislative purposes in criminalizing depraved heart murder.

³¹⁸ *Tait*, 669 So. 2d at 90.

³¹⁹ *Id.*

³²⁰ *Id.* at 87.

The decision's retrospective, tendentious characterization of facts is incompatible with the court's prevailing practice of leaving the determination of an actor's mens rea to the jury.

Moreover, the *Tait* holding seems flatly inconsistent with other recent decisions. In *Blanks v. State*, the defendant admitted shooting and killing a high school friend but denied the shooting was intentional.³²¹ The killing was not witnessed, and the defendant concealed the body.³²² Although the jury convicted of manslaughter, not depraved heart murder, the supreme court insisted that there was no error in indicting and instructing for depraved heart murder, and it even concluded that the evidence was sufficient to support a depraved heart murder conviction, notwithstanding the defense claim of accident.³²³ The dictum in *Blanks* is preferable to the result in *Tait* in that *Blanks* would leave the determination to the jury.³²⁴ Nevertheless, the reasoning in *Blanks* is questionable to the extent it suggests that accident might provide a defense to depraved heart murder. The court focused heavily on post-accident evidence to rebut the claim of accident, emphasizing the defendant's efforts to conceal the crime. "[The defendant's] conduct and statements following the killing were not consistent with that of a person who has accidentally killed a friend."³²⁵ The weight of such evidence is debatable because the defendant, after concealing the crime, revealed himself as the killer.³²⁶ More to the point, the court should have held that an accident resulting from sufficiently reckless conduct does not excuse or mitigate murder liability.³²⁷

³²¹ 547 So. 2d 29, 32 (Miss. 1989).

³²² *Blanks*, 547 So. 2d at 31-32.

³²³ *Id.* at 33-34. The court in *Blanks* reversed the conviction because of the admission of prejudicial evidence. *Id.* at 37.

³²⁴ *Id.* at 34. The court in *Tait* distinguished *Blanks* by evidence of defendant's remorse. *Tait*, 669 So. 2d at 90. But guilt and remorse led the defendant to admit the accidental shooting eleven days later in *Blanks*, 547 So. 2d at 32. The psychological relevance of remorse is open to question. See generally Martha Grace Duncan, "So Young and So Tender": Remorseless Children and the Expectations of the Law (2001) (unpublished manuscript, on file with the Mississippi Law Journal).

³²⁵ *Blanks*, 547 So. 2d at 34.

³²⁶ *Id.* at 32.

³²⁷ The court reversed because of the admission of evidence that the defendant

The court's analysis of inferences in *Blanks* suggests there was sufficient evidence even of deliberate design murder. In such a case, of course, the jury must conclude that the killing was not accidental. But for depraved heart murder, the jury verdict should be affirmed even if the killing was unintentional where the killer created risks of death through an act eminently dangerous that evinced a depraved heart regardless of human life. On the one hand, the post accident concealing of the body that might support an inference of intent to kill based on a theory of consciousness of guilt should equally support an inference of such extreme recklessness and indifference. On the other hand, the direct evidence of remorse in a case like *Tait* should be given to the jury, and the absence of efforts to conceal or deny should be accorded no weight in that case since the killing was observed. The witnesses amply described the objective circumstances of risktaking and the defendant's response to the accident, thus avoiding the need for any evidentiary inference.³²⁸ And the presence of witnesses eliminated the motive and opportunity for concealing the crime.

The latest word from the court, *Clark v. State*, seems generally consistent with dicta in *Blanks* and inconsistent with the result of *Tait*, though Justice McRae mentioned neither of those decisions in writing the opinion for the court.³²⁹ The killing in *Clark* occurred during a domestic dispute during which the victim locked herself in an office.³³⁰ The defendant retrieved a shotgun from his car and "shot the door several times in an attempt to enter the room. The shots hit [the victim] at close range and killed her."³³¹ The jury was instructed

had waved a gun around another person on another occasion. *Id.* at 37 (citing MISS. R. EVID. 404(b)). Because the defendant claimed the shooting was an accident, the court did not persuasively explain why the otherwise inadmissible evidence did not fall under the exception for "absence of mistake or accident." See MISS. R. EVID. 404(b).

³²⁸ *Tait*, 669 So. 2d at 87.

³²⁹ 693 So. 2d 927, 933 (Miss. 1997). Justice Banks concurred in the result without opinion. *Clark*, 693 So. 2d at 933. The court's lack of attention to precedent may be the responsibility of counsel who failed to bring relevant authority to its attention.

³³⁰ *Id.* at 929.

³³¹ *Id.*

on murder and voluntary manslaughter.³³² It was not instructed on culpable negligence manslaughter, despite a defense request.³³³

The supreme court held the evidence sufficient to support a depraved heart murder conviction even though the victim was locked behind a steel door and the defendant claimed he had no intent to kill her.³³⁴ The court emphasized that "in a 'depraved heart' murder, malice can be inferred from the circumstances if the actions involved a very high degree of carelessness evincing a reckless indifference to the danger to human life."³³⁵ The result is clear: shooting repeatedly through a door with a shotgun knowing there is a human being on the other side is criminally reckless enough to support a murder conviction. Unfortunately, the court proceeded to explain this result in terms of "malice," reasoning that "[m]alice too may be inferred when such a high degree of recklessness is involved."³³⁶ The court held further that the requested culpable negligence manslaughter instruction was properly refused because the extreme recklessness displayed by the defendant could only be malice and thus support depraved heart murder and not culpable negligence.³³⁷ "Looking at the evidence in a light most favorable to [the defendant], as well as all reasonable inferences which may be drawn therefrom, a reasonable jury could not have found him guilty of mere culpable negligence."³³⁸

In other words, while *Tait* held that a jury erred as a matter of law in finding an unintended shooting death to be depraved heart murder, *Clark* held that a reasonable jury could not find an unintentional shooting death to be culpable negligence because it could only be depraved heart murder. *Blanks* points the way out of this dilemma. In *Blanks*, an unjustifiable

³³² *Id.* The opinion is inscrutable, but the case was apparently prosecuted and tried on both deliberate design and depraved heart theories because the trial court decided motions based on deliberate design and the supreme court based its decision on depraved heart. *Id.* at 931.

³³³ *Id.* at 929.

³³⁴ *Id.* at 933.

³³⁵ *Id.* at 930 (quoting *Windham v. State*, 602 So. 2d 801, 802 (Miss. 1992)).

³³⁶ *Id.* at 931.

³³⁷ *Id.* at 932-33.

³³⁸ *Id.*

and unexcusable shooting death was found to provide sufficient evidence for manslaughter based on culpable negligence, murder based on depraved heart—and possibly even murder based on deliberate design.³³⁹ The court held that where the jury was properly instructed on all applicable homicide offenses and its verdict was supported by adequate evidence, its verdict should not be disturbed on appeal.³⁴⁰

From *Blanks* it follows that facts presenting sufficient evidence of depraved heart murder also present facts that would support a verdict of culpable negligence manslaughter. In order for the jury to determine whether the recklessness is so aggravated as to rise to depraved heart murder, the jury in unintentional homicide cases should be given instructions permitting convictions for either crime. In depraved heart murder cases where there is a fact question of sudden combat or provocation, the court should also instruct on voluntary manslaughter, as it did in *Clark*.³⁴¹

In *Dowda v. State*, the defendant placed a gun to the victim's head and pulled the trigger.³⁴² The defendant had previously removed the clip from the gun, and the judge who tried the case without a jury specifically found that the defendant mistakenly believed the gun was unloaded.³⁴³ The court nevertheless convicted the defendant of depraved heart murder.³⁴⁴ The court of appeals, without citing any supreme court decisions on point, held that the belief that the gun was unloaded did not prevent depraved heart: "The legal conclusion reached by the trial judge was sound—a person's pulling the trigger on a weapon that has been placed against another's head, even when the first person believes the gun to be unloaded, can nonetheless be an act that is in utter disregard for life."³⁴⁵ Two judges dissented, arguing that a mistaken belief

³³⁹ *Blanks*, 547 So. 2d at 33-34.

³⁴⁰ *Id.* at 34.

³⁴¹ The trial court properly gave voluntary manslaughter instructions in *Clark*, 693 So. 2d at 931.

³⁴² 1999-KA-00764-COA, ¶ 3, 776 So. 2d 714, 715 (Miss. Ct. App. 2000).

³⁴³ *Dowda*, 1999-KA-00764-COA, ¶ 9, 776 So. 2d at 716.

³⁴⁴ *Id.* ¶¶ 7, 9, 776 So. 2d at 715-16.

³⁴⁵ *Id.* ¶ 9, 776 So. 2d at 716.

that the gun was unloaded failed to establish depraved heart murder.³⁴⁶

Killings without deadly weapons. Although the cases have not worked up any precise rule, it appears that unexpected deaths resulting from simple assaults may not support even manslaughter liability³⁴⁷ while unexpected deaths resulting from assaults accompanied by an attempt to inflict serious injury are sufficient evidence of depraved heart murder. Therefore, evidence that a defendant struck a victim "several times with a large stick," including on the head, was sufficient to sustain a depraved heart murder conviction.³⁴⁸ Evidence of extensive blows to the head from which the victim died was sufficient to support a verdict of depraved heart murder,³⁴⁹ as was evidence that an adult defendant kicked a four-year-old in the stomach and hit her in the head repeatedly, inflicting severe injuries from which she died.³⁵⁰ Causing death by an assault with a hammer was likewise sufficient to support a murder conviction based on a theory of depraved heart.³⁵¹

Lack of intent notwithstanding, [defendant's] use of a hammer to assault a 79-year-old, one-armed man (who was run-

³⁴⁶ *Id.* ¶¶ 13-20, 776 So. 2d at 716-17 (Irving, J., dissenting) (finding sufficient evidence for manslaughter). Justice King joined Justice Irving's opinion. *Id.* ¶ 12, 776 So. 2d at 716.

³⁴⁷ *Miller v. State*, 97-KA-00072-COA, ¶¶ 14-16, 733 So. 2d 846, 850 (Miss. Ct. App. 1998) (suggesting in dictum that unintended death resulting from blow to neck is insufficient evidence of culpable negligence manslaughter).

³⁴⁸ *Fairman v. State*, 513 So. 2d 910, 912, 914 (Miss. 1987). In one of the few opinions to address intervening causation, the supreme court further held that alleged maltreatment by physician did not relieve the defendant of liability. *Fairman*, 513 So. 2d at 913 ("[T]he unlawful acts or omissions of an accused need not be the sole cause of death. The test for responsibility is whether the act of the accused contributed to the death, and, if it did, he is not relieved of responsibility by the fact that other causes also contributed.") (citing *Holliday v. State*, 418 So. 2d 69, 71 (Miss. 1982)).

³⁴⁹ *Johnson v. State*, 475 So. 2d 1136, 1149 (Miss. 1985).

³⁵⁰ *Neighbors v. State*, 361 So. 2d 345, 347 (Miss. 1978); see also *Smith v. State*, No. 96-CA-01271-COA, 1998 Miss. App. LEXIS 933, at *1-*2 (Miss. Ct. App. Oct. 27, 1998) (affirming depraved heart murder conviction entered pursuant to plea agreement where defendant struck infant during potty training causing him to fall off toilet and strike his head).

³⁵¹ *Sanders v. State*, 1999-KA-01663-SCT, ¶¶ 11-13, 781 So. 2d 114, 118-19 (Miss. 2001); *Windham v. State*, 602 So. 2d 798, 799 n.1 (Miss. 1992).

ning away) and his 78-year-old wife may, at the very least, be described as grave recklessness manifesting utter disregard or indifference to the resultant creation of eminent [sic] danger to the life of both [victims].³⁵²

In a case where a mother allowed her severely retarded daughter to die of starvation and thirst, the court was divided.³⁵³ A majority agreed to reverse a murder conviction, but only a plurality supported the conclusion that the evidence was sufficiently ambiguous that the conviction of depraved heart murder should be reversed and remanded for a second trial.³⁵⁴ (Three justices concurred, but on the ground that depraved heart murder should not apply to killings of individuals,³⁵⁵ and two justices dissented because they found the evidence sufficient.³⁵⁶) In concluding that the evidence was inadequate, the plurality placed great weight on the extreme difficulty posed by the victim's medical condition and by the record of the defendant seeking medical help on more than a dozen occasions prior to the death.³⁵⁷

The [defendant] . . . could not give the requisite care in this unusual situation. . . . We should not hold the defendant to a standard of care that she could not give and a standard of care that even professionals only talked about but could not give permanently and a standard of care that was not available to the defendant even through charitable or government agencies.³⁵⁸

In remanding, the plurality also concluded that the jury should be instructed on culpable negligence manslaughter at retri-

³⁵² *Windham*, 602 So. 2d at 802.

³⁵³ *Clayton v. State*, 652 So. 2d 720 (Miss. 1995).

³⁵⁴ *Clayton*, 652 So. 2d at 720.

³⁵⁵ *Id.* at 727 (Hawkins, C.J., concurring in part and dissenting in part) (joining Chief Justice Hawkins were Justices Sullivan and Banks).

³⁵⁶ *Id.* at 727 (Smith, J., dissenting) (joining this opinion was Justice Roberts). The dissenting opinion argues very convincingly that the plurality minimized inculpatory evidence and draws on authority from other jurisdictions to support murder liability. *Id.*

³⁵⁷ *Id.* at 724-25 (plurality opinion).

³⁵⁸ *Id.* at 725.

al.³⁵⁹

B. Culpable Negligence Manslaughter

1. Language of the Statute

The mens rea required for Mississippi's version of involuntary manslaughter is "culpable negligence."³⁶⁰ The terminology of "culpable negligence" was borrowed from civil law and had no fixed criminal meaning when it was first adopted.³⁶¹ Over time different jurisdictions have variously explained its meaning, and the supreme court once remarked that "culpable negligence . . . is an undefinable phrase,"³⁶² though it is not unconstitutionally vague.³⁶³

It was recognized at common law that the carelessness necessary for manslaughter was greater than that required for tort liability.³⁶⁴ The Mississippi statute was probably intended to do little more than codify the common law, subject to the modifications expressed in other statutes.³⁶⁵ Cases have held

³⁵⁹ *Id.* at 726 ("The trial court properly gave instructions allowing the jury to find [the defendant] guilty of manslaughter rather than murder."). The Chief Justice's remark that he disagreed with the majority that manslaughter instructions cannot be proper, must have referred to an earlier draft of the opinion for the court. *See id.* at 727 (Hawkins, C.J., concurring in part and dissenting in part).

³⁶⁰ *See* MISS. CODE ANN. § 97-3-47 (2000); *supra* note 103 (quoting text and discussing the origin of this statute).

³⁶¹ Search of state opinions on LEXIS (States; Omni files) before 1820 employing "culpable negligence" yielded twenty cases. All employed "culpable negligence" to denote a loss-shifting doctrine in civil cases. A similar search of Mississippi opinions before 1900 yielded eighteen cases. All applied "culpable negligence" to denote a loss-shifting doctrine in torts or contracts. For an early manslaughter prosecution under a "culpable negligence" statute, see *Thomas v. Winchester*, 6 N.Y. 397, 409 (1852) (finding mislabeling narcotic prescription to be culpable negligence).

³⁶² *Sims v. State*, 115 So. 217, 219 (Miss. 1928); *see* BLACK'S LAW DICTIONARY 1057 (7th ed. 1999) (stating that culpable negligence "has been held incapable of exact definition") (quoting 65 C.J.S. *Negligence* § 1(13) (1966)).

³⁶³ *Mayfield v. State*, 612 So. 2d 1120, 1128 (Miss. 1992).

³⁶⁴ *Cf.* 4 BLACKSTONE, *supra* note 8, at *191 ("So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done").

³⁶⁵ The evidence is inconclusive, but a contemporaneous Missouri codification,

that it is reversible error to give instructions that confuse culpable negligence with either ordinary negligence³⁶⁶ or gross negligence.³⁶⁷

2. Judicial Elaboration

Mississippi cases have defined culpable negligence narrowly as "the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk."³⁶⁸ Such negligence expresses "wanton disregard of, or utter indifference to, the

like Mississippi's modeled on the New York Penal Code, added the phrase "which would be manslaughter at common law." *Rice v. State*, 8 Mo. 561, 563 (1844). Though the Missouri court construed this language as providing an additional element, it might have been merely declarative of the purpose of the manslaughter statute.

The most significant modification of the common law concerned the defense of excuse allowed in barehanded killings in fights. These were treated as manslaughter at common law. *See supra* notes 14, 79-81 and accompanying text.

³⁶⁶ *Bailey v. State*, 169 So. 765, 767 (Miss. 1936) (stating manslaughter conviction cannot be based on mere negligence); *Shows v. State*, 168 So. 862, 864 (Miss. 1936) (holding definition of culpable negligence requires more than simple negligence); *see also* *Frambes v. State*, 97-KA-00921-COA, ¶¶ 15-19, 751 So. 2d 489, 492 (Miss. Ct. App. 1999) (reversing aggravated DUI conviction where instruction shifted burden to defendant of proving contributory negligence beyond reasonable doubt).

³⁶⁷ *Grinnell v. State*, 230 So. 2d 555, 558 (Miss. 1970) (opining that defining culpable negligence in terms of gross negligence presented improper guide to jury); *Reynolds v. State*, 24 So. 2d 781, 784 (Miss. 1946) (reversing manslaughter conviction and remanding to lower court because defining culpable negligence as gross negligence is prejudicial error); *McKinney v. State*, 18 So. 2d 446, 447 (Miss. 1944) (stating that instructing jury on gross negligence in manslaughter case could mislead jury as to what constitutes culpable negligence); *cf. Nicholson ex rel. Gollott v. State*, 646 So. 2d 1297, 1301 (Miss. 1994) ("A manslaughter conviction will only lie where a jury finds beyond a reasonable doubt that the accused is guilty of culpable negligence (must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life . . .), which is beyond gross negligence in a civil context.").

³⁶⁸ *Smith v. State*, 20 So. 2d 701, 705 (Miss. 1945) (reversing manslaughter conviction and remanding for new trial), *quoted in* *Evans v. State*, 562 So. 2d 91, 94 (Miss. 1990) (holding that state failed to prove manslaughter by culpable negligence); *see* *Harried v. State*, 98-KA-00586-COA, ¶¶ 6-9, 773 So. 2d 966, 968-69 (Miss. Ct. App. 2000). The court originally emphasized that the definition of culpable negligence should vary from case to case. *See generally* Fred B. Smith, *The Work of the Mississippi Supreme Court 1942-1946: Criminal Law*, 18 Miss. L.J. 16, 17 (1946)

safety of human life.”³⁶⁹ This judicial definition materially supplements the statute, and an instruction so defining culpable negligence must be given.³⁷⁰ When both depraved heart murder and culpable negligence manslaughter instructions are given, culpable negligence must not be defined as equivalent to “willfulness,” because doing so blurs the distinction between murder and manslaughter.³⁷¹

This restrictive formulation of culpable negligence apparently first emerged in early twentieth-century opinions that expressed judicial concern with the over-application of manslaughter to the growing number of automobile deaths. The court was convinced that “juries are overinclined to convict [in car accident cases] on proof of what is in fact no more than simple negligence.”³⁷² But notwithstanding the language re-

³⁶⁹ *Clayton v. State*, 652 So. 2d 720, 726 (Miss. 1995) (discussing appropriate language for culpable negligence manslaughter instruction); *Gant v. State*, 244 So. 2d 18, 19 (Miss. 1971) (affirming manslaughter conviction due to lack of culpable negligence), *quoted in Evans*, 562 So. 2d at 94; *see Dickerson v. State*, 441 So. 2d 536, 540 (Miss. 1983) (reversing manslaughter conviction and remanding for new trial); *see also Hopson v. State*, 615 So. 2d 576, 577 (Miss. 1993) (affirming culpable negligent manslaughter conviction of drunken driver); *Whitehurst v. State*, 540 So. 2d 1319, 1327-28 (Miss. 1989) (stating that under facts of case, defendant could not be convicted of culpable negligence manslaughter and could not have committed negligent manslaughter); *Gibson v. State*, 503 So. 2d 230, 234 (Miss. 1987) (stating that driver's intoxication alone is not enough for manslaughter conviction); *Hynum v. State*, 77 So. 2d 313, 314 (Miss. 1955) (affirming culpable negligence manslaughter conviction where jury properly found defendant guilty based on evidence of case); *Smith*, 20 So. 2d at 709 (reversing culpable negligence manslaughter conviction because finding of gross negligence on part of defendant did not meet higher statutory burden of culpable negligence); *Beckham v. State*, 97-KA-00724-COA, ¶ 7, 735 So. 2d 1059, 1061 (Miss. Ct. App. 1999) (holding that to convict for vehicular manslaughter, culpable negligence of defendant must be found); *cf. MODEL JURY INSTRUCTIONS*, *supra* note 92, § 8.15 (“[Defendant] was negligent and the negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life . . .”).

³⁷⁰ *Edwards v. State*, 97-KA-00434-COA, ¶¶ 13-15, 755 So. 2d 443, 447 (Miss. Ct. App. 1999) (holding jury instructions concerning culpable negligence were defective when they did not define which of defendant's acts or omissions could constitute criminal negligence). Where a defendant has requested a defining instruction and then withdraws the request, the omission is not reversible error. *Towner v. State*, 97-KA-01176-COA, ¶ 9, 726 So. 2d 251, 255 (Miss. Ct. App. 1998) (affirming manslaughter conviction of defendant for shooting death of twelve-year-old victim).

³⁷¹ *Clayton*, 652 So. 2d at 726.

³⁷² *Gant*, 244 So. 2d at 19 (quoting *McKinney v. State*, 18 So. 2d 446, 447

quired in jury instructions, it is questionable whether culpable negligence manslaughter requires strict proof of subjective indifference to the safety of human life.³⁷³

3. Cases

The statute does not distinguish between different methods of causing death, and the supreme court has emphasized that the same standard for culpable negligence applies, regardless of the instrumentality inflicting death.³⁷⁴ Nevertheless, it is useful to consider the application of culpable negligence in different classes of cases.

Motor vehicle fatalities. Culpable negligence while driving a motor vehicle has been found to support manslaughter liability in many cases where the defendant's carelessness exceeded ordinary negligence.³⁷⁵ In a 1927 accident, a bus driver was

(Miss. 1944) (Griffith, J., concurring)); see also *Ruffin v. State*, 32 So. 2d 882, 882 (Miss. 1947) (expressing concern over manslaughter conviction for simple negligence in automobile fatality).

³⁷³ See *infra* note 406 and accompanying text (noting convictions have been sustained even where defendants believed guns were unloaded); *infra* notes 375-78 and accompanying text (noting convictions have been sustained in automobile cases where intoxication is coupled with reckless driving). There likely would have been insufficient evidence for these convictions under older authority. Cf. *Gant*, 244 So. 2d at 21 (quoting *McKinney*, 18 So. 2d at 447 (Griffith, J., concurring)) (reversing manslaughter conviction based on evidence defendant had whiskey bottle in car, was weaving one hour before accident, and veered into victim's lane on curve, causing death).

³⁷⁴ *Craig v. State*, 520 So. 2d 487, 491 (Miss. 1988) (citing *Gandy v. State*, 373 So. 2d 1042, 1046 (Miss. 1979)).

³⁷⁵ See *Holloman v. State*, 656 So. 2d 1134, 1142-43 (Miss. 1995) (affirming culpable negligence manslaughter conviction where defendant was intoxicated, speeding and running red light); *Patrick v. State*, 249 So. 2d 667, 668-69 (Miss. 1971) (affirming culpable negligence manslaughter conviction where defendant driving seventy to seventy-five miles per hour in wrong lane of traffic); *Griffin v. State*, 135 So. 2d 198, 199-200 (Miss. 1961) (affirming conviction for culpable negligence manslaughter where father told sixteen-year-old son to speed and not stop while being pursued by police); *Moore v. State*, 117 So. 2d 469, 471-72 (Miss. 1960) (speeding through residential neighborhood); *Hatcher v. State*, 92 So. 2d 552, 557 (Miss. 1957) (hitting child riding a bicycle); *Dendy v. State*, 79 So. 2d 827, 828-29 (Miss. 1955) (passing car at crest of hill); *Coleman v. State*, 45 So. 2d 240, 242-43 (Miss. 1950) (driving intoxicated down wrong side of highway); *Henderson v. State*, 25 So. 2d 133, 135 (Miss. 1946) (passing truck without looking and colliding with oncoming vehicle); *Wilson v. State*, 161 So. 744, 745 (Miss.

speeding and driving carelessly while flirting with a woman who was sitting next to him.³⁷⁶ The court affirmed a manslaughter conviction based on culpable negligence where the bus driver crossed into the wrong lane and collided with the victim on a curve.³⁷⁷ The court has also held that unlawful racing may constitute culpable negligence and has held that both drivers may be liable for manslaughter when either driver collides with an oncoming vehicle.³⁷⁸

But the supreme court has also expressed some reluctance to find culpable negligence based on careless driving alone or upon a violation of rules or statutes,³⁷⁹ including the criminal prohibition of driving while intoxicated.³⁸⁰ In *Ducking v.*

1935) (speeding far in excess of posted limit); *Williams v. State*, 137 So. 106, 107 (Miss. 1931) (driving while intoxicated, hitting telephone pole, and killing passenger); *Bradford v. State*, 127 So. 277, 278-79 (Miss. 1930) (driving at excessive speed, but remanded on other grounds).

³⁷⁶ *Sims v. State*, 115 So. 217, 217-18 (Miss. 1928). The court conceded that the evidence of nose powdering was not competent but did not think the case should be reversed for that single error. *Sims*, 115 So. at 219. The contemporary applicability of older cases can be problematic both because social standards of risktaking have changed and because the standard for culpable negligence was stated differently.

³⁷⁷ *Id.* at 219.

³⁷⁸ *E.g.*, *Campbell v. State*, 285 So. 2d 891 (Miss. 1973). This is a logical inference from *Campbell*, in which the court affirmed a manslaughter conviction where the other driver in a race applied his brakes, swerving into an oncoming vehicle, resulting in death to drivers in other cars on a theory that the surviving driver "aided and abetted" the other driver's acts. *Campbell*, 285 So. 2d at 893, 895.

³⁷⁹ The court's approach evolved during the course of the last century. In an early vehicle homicide case, it suggested that the habitual violation of speed laws or yield requirements by many motorists did not prevent a motorist from being properly convicted of manslaughter when a violation caused death. *Wilson*, 161 So. at 745. In later cases the court scrutinized evidence of recklessness demonstrating indifference to human life. See *Dickerson v. State*, 441 So. 2d 536, 540 (Miss. 1983) (holding no evidence of culpable negligence where defendant was intoxicated but there was no other evidence of unsafe driving where victim's car was stopped in middle of road at night without lights and where defendant saw car and tried to stop); *Goudy v. State*, 35 So. 2d 308, 309 (Miss. 1948) (passing to right not culpable negligence).

³⁸⁰ *Frazier v. State*, 289 So. 2d 690, 692 (Miss. 1974) (holding intoxication must proximately cause death of another); *Lee v. State*, 7 So. 2d 875, 875 (Miss. 1942) (holding intoxication alone not sufficient); *Cutshall v. State*, 4 So. 2d 289, 292 (Miss. 1941) (holding intoxication alone is not sufficient for manslaughter but must proximately contribute both to state of culpable negligence and to death);

State, a school bus driver ran over and killed a six-year-old child who had gotten off the bus and was crossing the street in front of the bus.³⁸¹ At the time of the accident, the defendant had been instructed not to drive the bus; he was driving the route in the wrong direction, thus requiring children to cross the street; and he failed to count the children to verify that they had crossed the road.³⁸² Nevertheless, the court reversed a manslaughter conviction and concluded that the defendant's acts of carelessness "amounted to simple negligence, but under no stretch of the imagination could they be termed criminal or culpable negligence."³⁸³

Many cases have found that evidence of intoxication plus dangerous acts is sufficient to support a conviction of culpable negligence manslaughter.³⁸⁴ But the cases are not entirely

see *Childs v. State*, 521 So. 2d 882, 883 (Miss. 1988) (holding that evidence of driving under influence of intoxicating liquor in violation of section 63-11-30 of the Mississippi Code and running stop sign insufficient to sustain culpable negligence manslaughter but sufficient for aggravated DUI).

³⁸¹ 259 So. 2d 686, 687 (Miss. 1972).

³⁸² *Ducking*, 259 So. 2d at 687.

³⁸³ *Id.* at 688. The court was probably sensitive to the facts that the defendant, a seventeen-year-old student, had received only three days training as a school bus driver, and was substituting as a favor to the regular driver. See *id.* at 687.

³⁸⁴ *Holloman v. State*, 656 So. 2d 1134, 1142 (Miss. 1995) (affirming manslaughter conviction where there was evidence of intoxication, speeding, and running red light); *Atkinson v. State*, 392 So. 2d 205, 207 (Miss. 1981) (affirming manslaughter conviction where intoxicated driver attempted to pass another vehicle and delayed for several seconds after danger of oncoming vehicle was visible); *Gandy v. State*, 373 So. 2d 1042, 1046 (Miss. 1979) (holding intoxicated defendant causing death by driving in the wrong lane established culpable negligence); *Beckham v. State*, 97-KA-00724-COA, ¶¶ 2-4, 735 So. 2d 1059, 1060-62 (Miss. Ct. App. 1999) (affirming manslaughter conviction based on culpable negligence where intoxicated driver collided with car in front of him with such force both cars flipped over). The courts have emphasized that driving while intoxicated is not automatically culpable negligence but may provide an element of such negligence, tending to show careless disregard for the value of human life. *Beckham*, 97-KA-00724-COA, ¶¶ 7-10, 735 So. 2d at 1061-62; see *Jones v. State*, 1998-KA-01102-COA, ¶ 1, 761 So. 2d 907, 908 (Miss. Ct. App. 2000) (concerning "DUI manslaughter"); see also *Gibson v. State*, 503 So. 2d 230, 233 (Miss. 1987) (finding culpable negligence for intoxication plus evidence defendant left straight and level lane of interstate highway); *Chaffin v. State*, 227 So. 2d 478, 479 (Miss. 1969) (finding culpable negligence for intoxication plus evidence of speed over 100 miles per hour); *Hynum v. State*, 77 So. 2d 313, 315 (Miss. 1955) (finding culpable

consistent, and the appellate courts occasionally narrowly scrutinize facts to find insufficient evidence of culpable negligence. For example, in *Evans v. State*, the defendant collided with a stalled car that was being moved off the road.³⁸⁵ The defendant had drunk at least five cans of beer before the collision, appeared visibly intoxicated at the scene of the accident, and apparently took no action to avoid the collision.³⁸⁶ The court emphasized that drinking alone did not support a finding of culpable negligence,³⁸⁷ and it found no additional evidence of culpable negligence, though it concluded that the evidence supported a conviction of the "lesser included offense of negligently killing another while under the influence of intoxicating liquor."³⁸⁸

Such cases are likely to be rare now that the offense of aggravated DUI for causing deaths negligently while driving under the influence of intoxicants is both more easily proven (without the need for culpable negligence) and can result in a more severe penalty than manslaughter.³⁸⁹ Prosecutors will

negligence for intoxication plus evidence of speeding and weaving); *Lester v. State*, 46 So. 2d 109, 109 (Miss. 1950) (finding culpable negligence for intoxication plus evidence of weaving).

³⁸⁵ 562 So. 2d 91, 92 (Miss. 1990).

³⁸⁶ *Evans*, 562 So. 2d at 93.

³⁸⁷ *Id.* at 95 (citing *Downs v. State*, 41 So. 2d 19, 21 (Miss. 1949) (reversing manslaughter conviction for vehicle fatality where prosecutor did not prove causal connection between drinking and accident)); see *Frazier v. State*, 289 So. 2d 690, 692 (Miss. 1974) ("[Drinking] must create an abnormal mental and physical condition which tends to deprive one of the clearness of intellect and control of himself which he would otherwise possess.") (quoting *Cutshall v. State*, 4 So. 2d 289, 292 (Miss. 1941)). The court concluded that in the absence of drinking, the defendant would have been free from fault. *Evans*, 562 So. 2d at 95.

For other opinions finding that negligence and intoxication are not enough to establish culpable negligence, see *Craig v. State*, 520 So. 2d 487, 492-93 (Miss. 1988) and *Gandy*, 373 So. 2d at 1046.

³⁸⁸ *Evans*, 562 So. 2d at 97. The jury had also convicted of aggravated DUI, which in 1990 was a lesser included offense in that the authorized punishment was less serious than that for manslaughter. *Id.*; see *supra* notes 180-87 and accompanying text.

For other cases reversing culpable negligence manslaughter convictions where there was evidence of drinking or intoxication, see *Smith v. State*, 20 So. 2d 701, 706 (Miss. 1945); *Cutshall*, 4 So. 2d at 293; *Scott v. State*, 185 So. 195, 196 (Miss. 1938); and *Shows v. State*, 168 So. 862, 864 (Miss. 1936).

³⁸⁹ See *supra* notes 180-87 and accompanying text.

have strong incentives to charge that crime rather than manslaughter where deaths result from drunk driving.

Simple assault. The supreme court has held that evidence of an assault including five or six open-handed blows was sufficient to support a conviction of manslaughter.³⁹⁰ In addition, the supreme court affirmed a manslaughter conviction where an inmate struck a fellow inmate twelve times in the chest as part of a gang initiation, despite the victim's supposed consent to the assault.³⁹¹ In contrast, the court of appeals has maintained that a simple assault resulting in an unexpected death does not rise to the level of culpable negligence.³⁹² Hence it found that a barehanded blow to the neck that resulted in death was not sufficient evidence of culpable negligence.³⁹³ The court of appeals nevertheless suggested that involuntary manslaughter liability might result from the fact that death occurred during the commission of a misdemeanor assault.³⁹⁴

Aggravated assault and killings with deadly weapons. Because homicides resulting either from a deadly weapon or from an aggravated assault generally support a conviction of depraved heart murder,³⁹⁵ and because the mens rea for depraved heart murder differs from that required for culpable negligence manslaughter only in that it involves a higher de-

³⁹⁰ *Jones v. State*, 442 So. 2d 919, 919, 921 (Miss. 1983). Evidence included the defendant's admission that he struck the victim five or six times but also included substantial circumstantial evidence that might have supported an inference of a more sustained fight. *Jones*, 442 So. 2d at 919-20. The victim died from brain injuries over one year later. *Id.* The defendant was tried for murder, and the jury returned a manslaughter conviction as a lesser included offense, apparently without any specific finding of culpable negligence, and the supreme court affirmed, finding sufficient evidence. *Id.* at 921.

³⁹¹ *Durr v. State*, 95-CT-00488-SCT, ¶¶ 4, 8, 722 So. 2d 134, 134-35 (Miss. 1998) (affirming manslaughter conviction despite omission of jury instruction on accident). Justice McRae, joined by Justice Waller, dissented, asserting that evidence that the assault was relatively mild created a fact question of accident. *Durr*, 95-CT-00488-SCT, ¶ 14, 722 So. 2d at 136 (McRae, J., dissenting).

³⁹² *Miller v. State*, 97-KA-00072-COA, ¶ 15, 733 So. 2d 846, 850 (Miss. Ct. App. 1998).

³⁹³ *Miller*, 97-KA-00072-COA, ¶¶ 16, 19, 733 So. 2d at 850-51.

³⁹⁴ *Id.* ¶¶ 13-14, 733 So. 2d at 849-50. For discussion and questioning of this reasoning, see *infra* notes 415-19 and accompanying text.

³⁹⁵ See *supra* notes 297-303 (deadly weapon), 348-52 (aggravated assaults).

gree of recklessness,³⁹⁶ it follows that an aggravated assault or reckless shooting should provide sufficient evidence of culpable negligence. The cases are in accord that inflicting a fatal wound with a dangerous weapon supports an inference of culpable negligence, though the courts have never expressly so stated.³⁹⁷ The supreme court has affirmed manslaughter convictions where a child died as a result of severe beatings and cuttings³⁹⁸ and where a man died as the result of a severe beating.³⁹⁹

The supreme court has repeatedly affirmed culpable negligence manslaughter convictions resulting from shooting deaths.⁴⁰⁰ It observed in a case where a defendant aimed a loaded gun at his nephew during a scuffle:

³⁹⁶ *Windham v. State*, 602 So. 2d 798, 801 (Miss. 1992); see *supra* notes 282-83, 371 and accompanying text.

³⁹⁷ *Roberson v. State*, 257 So. 2d 505, 507-08 (Miss. 1972) (affirming culpable negligence manslaughter conviction where defendant shot at house, killing victim, regardless of intent). In *Roberson*, the court suggested that the result was proper both because there was sufficient evidence of culpable negligence and because manslaughter was a lesser included offense of murder, for which there was sufficient evidence. *Roberson*, 257 So. 2d at 508; cf. *Gaddis v. State*, 42 So. 2d 724, 726 (Miss. 1949) (affirming murder conviction but opining that manslaughter would be proper if defendant shot the victim accidentally as claimed). The presumption of culpable negligence may be enough to overcome the *Weathersby* rule. See *infra* note 402.

This result converges with the treatment of sufficiency of evidence challenges in murder prosecutions where the jury returns a verdict of manslaughter either on a theory of heat of passion or as a lesser included offense. *Ford v. State*, 96-KA-01228-COA, ¶ 33, 734 So. 2d 343, 351 (Miss. Ct. App. 1999) (holding evidence sufficient to support manslaughter conviction, without specifying theory, where defendant held knife at time of fatal wounding and evidence was inconsistent with self defense).

³⁹⁸ *Hancock v. State*, 47 So. 2d 833, 840 (Miss. 1950).

³⁹⁹ *McCaffrey v. State*, 187 So. 740, 744-45 (Miss. 1939). The opinion in *McCaffrey* is difficult to read. The court's discussion of evidence indicates plainly that there was credible evidence of use of some tool as a weapon, and possibly a stomping on the victim's head. *McCaffrey*, 187 So. at 741-43. The court observed, however, "[t]he jury could infer . . . the killing [was] the unanticipated result flowing from the fight, in which fists and feet were used, but no weapons." *Id.* at 744 (emphasis added). It appears, however, that the court meant that while the jury could have so found, its verdict of manslaughter indicated that it did not so find.

⁴⁰⁰ See generally *Harried v. State*, 98-KA-00586-COA, ¶¶ 5-9, 773 So. 2d 966, 968-69 (Miss. Ct. App. 2000) (affirming culpable negligence manslaughter conviction in shooting case).

It is hard to conceive of a clearer cut demonstration of what is termed "culpable negligence" than for a person to point, aim, and discharge a loaded pistol at another; and, where this negligence results in the death of the human being at whom the pistol is pointed, the crime of manslaughter is completely made out and established.⁴⁰¹

Even where the victim allegedly had displayed a knife, the court observed, "[T]he evidence is uncontradicted that [defendant] drew a gun and cocked it and aimed it at [the victim]. We regard it as well within the jury's province to consider this as a reckless indifference to human life."⁴⁰² In *Tait v. State*, the supreme court reversed a depraved heart murder conviction in an accidental shooting case but rendered a verdict of culpable negligence manslaughter where the defendant cocked a gun and held it to the victim's head.⁴⁰³ Bringing a loaded, cocked handgun that is later discharged during a fight for possession has also been found to be culpable negligence.⁴⁰⁴ The court of appeals affirmed a manslaughter conviction where a shooting death was the result either of a deliberate firing or the accidental firing of a handgun during a scuffle.⁴⁰⁵

The supreme court has repeatedly indicated that a

⁴⁰¹ 121 So. 492, 493 (Miss. 1928).

⁴⁰² *Burge v. State*, 472 So. 2d 392, 396 (Miss. 1985). *Burge* is particularly significant for its conclusion that the *Weathersby* rule does not preclude manslaughter liability where the defendant claims the display of force was motivated by fear. *Burge*, 472 So. 2d at 396; cf. *Weathersby v. State*, 147 So. 481, 482 (Miss. 1933) (holding that defendant's version of events should be accepted when he or she was only witness unless contradicted by other evidence or inferences). This doctrine has spawned much litigation and is sparingly applied. See *Turner v. State*, 1999-KA-02010-SCT, ¶¶ 10-15, 796 So. 2d 998, 1001-02 (Miss. 2001) (holding expert opinion evidence contradicting defendant's claim of accidental firing was sufficient to prevent application of *Weathersby* rule).

⁴⁰³ 669 So. 2d 85 (Miss. 1996); see *supra* notes 315-20 and accompanying text.

⁴⁰⁴ *Butler v. State*, 375 So. 2d 1039, 1040 (Miss. 1979) (affirming manslaughter conviction where defendant fired handgun into crowded bar and later returned with cocked gun in holster which fired during struggle).

⁴⁰⁵ See *Towner v. State*, 97-KA-01176-COA, ¶¶ 15-16, 726 So. 2d 251, 256 (Miss. Ct. App. 1998). The facts were in dispute but did not affect the courts holding that an accident instruction was neither required nor proper where the shooting occurred outside a lawful activity. *Towner*, 97-KA-01176-COA, ¶¶ 13-16, 726 So. 2d at 254.

defendant's erroneous belief that a gun is unloaded does not preclude a finding of culpable negligence.⁴⁰⁶ But the courts do not impose strict criminal liability for shooting deaths, and an accidental shooting that involves no risktaking above ordinary negligence will not support a conviction.⁴⁰⁷

Culpable omissions. The supreme court has made clear that reckless neglect of a child by parents can be culpable negligence.⁴⁰⁸ The court of appeals has been reluctant to impose

⁴⁰⁶ *Strode v. State*, 406 So. 2d 820, 823 (Miss. 1981) (affirming culpable negligence manslaughter conviction where defendant shot friend while playing with gun he believed unloaded). The court in *Strode* distinguished the holding in *Latiker v. State*, 278 So. 2d 398 (Miss. 1973), emphasizing the absence of horseplay, drunken brawling, or other reckless conduct in that case. *Strode*, 406 So. 2d at 822.

In *Gregory v. State*, the court affirmed a culpable negligence manslaughter conviction where a husband believed he emptied a handgun and handed it to his angry and intoxicated wife during an argument. 118 So. 906, 910 (Miss. 1928). She pointed the gun at her chest and pulled the trigger twice, and he encouraged her to try again by stating, "You can't kill yourself with an empty gun." *Gregory*, 118 So. at 908. She responded by pulling the trigger a third time and the gun fired. *Id.* The court specifically found that the failure to verify that the chamber was empty was culpable negligence under these circumstances. *Id.* at 909. The authority of this case is problematic because the defendant did not argue that the case was governed by the predecessor of MISS. CODE ANN. § 97-2-49 (2000) (aiding suicide).

See also *Crossley v. State*, 420 So. 2d 1376, 1381 (Miss. 1982) (holding a handgun a deadly weapon even when not loaded or capable of being fired).

⁴⁰⁷ *Phillips v. State*, 379 So. 2d 318, 320 (Miss. 1980) (holding no culpable negligence where defendant was unloading shotgun, believed it empty, pointed at ceiling and pulled trigger, killing girlfriend, and record showed no horseplay, intoxication, fighting or other reckless conduct); *Latiker*, 278 So. 2d at 399 (pulling gun from pocket when it fired).

The rule in these cases is good, but its application questionable. Both opinions overlooked evidence and inferences that could support a finding of extreme recklessness. In *Phillips*, the defendant was unloading his loaded rifle while his girlfriend sat "on the arm of the couch directly in front of the appellant." *Phillips*, 379 So. 2d at 319. When he was pointing the rifle at the ceiling, she stood up into the line of fire. *Id.* In *Latiker*, the defendant pulled the gun from his pocket when it fired. *Latiker*, 278 So. 2d at 398. Moreover, he fled after the accident (or at least did not surrender himself for two days). *Id.* Flight alone, like concealing a crime, should provide an inference of specific intent, let alone culpable negligence. See *Blanks v. State*, 547 So. 2d 29 (Miss. 1989); *supra* notes 321-27 and accompanying text; see also *Williams v. State*, 667 So. 2d 15, 23 (Miss. 1996) (holding evidence that defendant removed body from scene of shooting sufficient to support manslaughter verdict over claim of self defense).

⁴⁰⁸ *Jones v. State*, 678 So. 2d 707, 710 (Miss. 1996) (holding failure to obtain

manslaughter liability for neglect, even under dangerous circumstances, where the violation of a duty of care was not closely connected to the sequence of events leading to the death. A problem with this approach is illustrated by *Edwards v. State*, where the court reversed a culpable negligence manslaughter conviction of the parents of a four-year-old who took the child, who could not swim, camping on a sandbar on the Pearl River and then lost all track of the child.⁴⁰⁹ The lack of details of the child's location preceding the drowning persuaded the court that evidence was insufficient to support a finding of culpable negligence.⁴¹⁰ Yet the evidence was vague precisely because neither the parents nor others present were paying attention.⁴¹¹ The dissent argued forcefully that merely taking a child on such a trip was not culpable negligence but that additional evidence showed dangers that satisfied the standard for culpable negligence:

It was a reasonable probability and should have been anticipated that in such an environment a four-year-old child could not only fall into or enter the water but also be unretrievable for rescue and drown as a result. The [defendants] recklessly disregarded this risk and the probability of fatal consequences to their child as a result of their having willfully placed him in an environment that they themselves created for him.⁴¹²

Other unlawful acts. The supreme court has repeatedly held that causing death while committing an unlawful act does not alone satisfy the requirement of "culpable negligence."⁴¹³

medical aid for eleven-month-old child with perforated colon and failure to supervise that led to unexplained cocaine poisoning established culpable negligence); cf. *Clayton v. State*, 652 So. 2d 720, 726 (Miss. 1995) (remanding for retrial on depraved heart murder and thus implicitly assuming sufficient evidence of culpable negligence manslaughter where mother failed to provide food and medical care for two-year-old child).

⁴⁰⁹ 97-DP-00566-SCT, ¶ 23, 755 So. 2d 443, 449 (Miss. Ct. App. 1999).

⁴¹⁰ *Edwards*, 97-DP-00566-SCT, ¶¶ 20-22, 755 So. 2d at 448-49.

⁴¹¹ *Id.*

⁴¹² *Id.* ¶¶ 29-31, 755 So. 2d at 450-51 (Lee, J., dissenting).

⁴¹³ An instruction permitting a finding of culpable negligence from a violation of speed laws is reversible error. *Bailey v. State*, 169 So. 765, 766-67 (Miss. 1936). In *Cutshall v. State*, the court recognized that drunk driving was a misdemeanor but nevertheless emphasized that a resulting death was not automatically

Moreover, it has emphasized that there must be a close causal connection between the dangerous act and the resulting death.⁴¹⁴

Nevertheless, the court of appeals concluded in *Miller v. State* that a barehanded blow that unexpectedly caused death but that did not itself evidence culpable negligence might be manslaughter under the statute.⁴¹⁵ The court of appeals reasoned that section 97-3-47 was meant to codify common law involuntary manslaughter, and it observed that common law manslaughter liability arose when death resulted either from an illegal act or from culpable negligence.⁴¹⁶ The court of appeals followed a similar approach in *Towner v. State*, where it held that regardless of intent, the firing of a concealed gun was unlawful and the resulting death "at least" manslaughter, because it occurred as the result of an unlawful act.⁴¹⁷ The court

manslaughter. 4 So. 2d 289, 291 (Miss. 1941). Several cases held that evidence sufficient for aggravated DUI convictions was not sufficient for culpable negligence manslaughter. *Evans v. State*, 562 So. 2d 91, 97 (Miss. 1990); *Childs v. State*, 521 So. 2d 882, 883 (Miss. 1988); *Craig v. State*, 520 So. 2d 487, 492-93 (Miss. 1988); *cf.* *Jones v. State*, 145 So. 2d 446, 449-50 (Miss. 1962) (holding reversible error to instruct so that intoxication alone may be found to establish culpable negligence). See generally *supra* notes 379-83, 387-88 and accompanying text (discussing cases that hold that killing while violating the criminal prohibition of driving under the influence does not automatically establish culpable negligence).

⁴¹⁴ See *Jabron v. State*, 159 So. 406, 407 (Miss. 1935) (holding evidence insufficient to prove culpable negligence where defendant only gave child three swallows of whisky and was unaware others had previously given child whisky that cumulatively produced fatal alcohol poisoning). Though grounding its holding in language of causation, noting the requirement that death result as the natural and probable consequence of defendant's act, the court emphasized both that the defendant did not know the child had access to other alcohol and that there was no evidence that three swallows of whisky was likely to be dangerous to the life of a six-year-old child. *Jabron*, 159 So. at 407.

⁴¹⁵ 97-KA-00072-COA, ¶¶ 15-16, 733 So. 2d 846, 850 (Miss. Ct. App. 1998).

⁴¹⁶ *Miller*, 97-KA-00072-COA, ¶¶ 13-14, 733 So. 2d at 849-50. This interpretation is apparently without precedent in the state's history. When New York interpreted its killing-during-commission-of-misdemeanor statute (the model for Mississippi's) as a misdemeanor manslaughter statute, it imposed manslaughter liability for an assault without intent to kill. See *Darry v. People*, 10 N.Y. 120 (1854). Mississippi apparently never so broadly applied the statute.

⁴¹⁷ 97-KA-01176-COA, ¶¶ 14-15, 726 So. 2d 251, 256 (Miss. Ct. App. 1998). The reasoning in *Towner* would result in strict manslaughter liability for gunshot deaths and eliminate any defense of accident in many common situations where the unexcused, unjustified discharge of a weapon violated a municipal ordinance

of appeals was probably right as to the doctrine of manslaughter at common law and partially right as to the original meaning of the statute. In returning to the age of Blackstone, however, the court of appeals overlooked both the original 1839 statutory scheme, which excluded homicide liability for unintended barehanded killings,⁴¹⁸ and the restriction of the statute by authoritative supreme court interpretations to killings with culpable negligence.⁴¹⁹ Accordingly, those decisions finding manslaughter established by an unlawful act not otherwise culpably negligent should be regarded as aberrational.

or other positive law.

⁴¹⁸ MISS. CODE ANN. § 97-3-17(c) (2000) (stating excusable homicide applies to killings during sudden combat where the defendant takes no undue advantage and neither employs a dangerous weapon nor a cruel or unusual method). This excuse treated unpremeditated barehanded killings during a fight differently from similar killings with weapons (which were voluntary manslaughter). It thus modified precisely the common law "unlawful act" doctrine relied on by the court of appeals in *Miller*.

⁴¹⁹ *Smith v. State*, 20 So. 2d 701, 704 (Miss. 1945) (holding indifference as to consequences requires indifference under circumstances involving danger to life). The opaque opinion in *McCaffrey v. State* discussed the evidence in such detail and then dwelt on the inferences of either a weapon or the intent to inflict serious disabling injuries because a simple assault would *not* have supported the manslaughter conviction under challenge. 187 So. 740 (Miss. 1939).

In *Jones v. State*, the court assumed implicitly that manslaughter committed by cocaine poisoning of a sick eleven-month-old girl required culpable negligence, even though the prosecution proceeded under MISS. CODE ANN. §§ 97-3-29, -39 (misdemeanor manslaughter and misdemeanor contributing to delinquency, respectively). 678 So. 2d 707, 710 (Miss. 1996). The court insisted that culpable negligence required wanton disregard of or utter indifference to the safety of human life. *Jones*, 678 So. 2d at 710-11 (quoting *Campbell v. State*, 285 So. 2d 891, 893 (Miss. 1973)).

The commission of several unlawful acts (delinquency, possession of cocaine) by themselves plainly did not satisfy the court's standard of culpable negligence. But the court emphasized that additional facts did support a finding of culpable negligence:

The jury could have reasonably found that [defendant parents] were culpably negligent by failing to obtain prompt medical attention and by not properly supervising their child which resulted in cocaine ingestion. It is the presence of cocaine in an eleven-month-old child and not necessarily the way in which it got there that evidences culpable negligence.

Id. at 710.

IV. THE CONFUSION OF MENS REA FOR MURDER AND MANSLAUGHTER

The history of the common law classification of murder and manslaughter suggests an important difference between the levels of culpability required for the two crimes. This is confirmed by the significant difference in punishment. In Mississippi, capital murder is punishable by death;⁴²⁰ murder by life imprisonment;⁴²¹ and manslaughter by up to twenty years imprisonment.⁴²²

Nevertheless, a searching review of appellate decisions reviewing murder and manslaughter convictions for unintentional killings fails to reveal a coherent distinction between the mens rea required for murder and that required for manslaughter. The supreme court's efforts to define culpable negligence have successfully differentiated the mens rea required for manslaughter from the carelessness sufficient for civil tort liability. But those efforts have only served to confuse the relationship of the culpable negligence required for manslaughter and the act eminently dangerous and evincing a depraved heart required for murder. The judicial definition of culpable negligence as requiring "conduct evincing a reckless disregard for the value of human life or the conscious or wanton disregard of, or utter indifference to, the safety of another"⁴²³ closely approaches the language of the statute defining depraved heart murder.

This failure to articulate different standards for murder and manslaughter produces two undesirable results. First,

⁴²⁰ MISS. CODE ANN. § 97-3-21 ("Every person who shall be convicted of capital murder shall be sentenced (a) to death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in Section 47-7-3(1)(f)."). See generally *id.* § 99-19-101 (discussing sentencing procedure in capital cases).

⁴²¹ *Id.* § 97-3-21 ("Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the State Penitentiary.").

⁴²² *Id.* § 97-3-25 ("Any person convicted of manslaughter shall be fined in a sum not less than five hundred dollars, or imprisoned in the county jail not more than one year, or both, or in the penitentiary not less than two years, nor more than twenty years.").

⁴²³ *Burge v. State*, 472 So. 2d 392, 395 (Miss. 1985).

because jury instructions are either inadequate or confusing, they encourage differing verdicts in similar cases. Because the substantive legal standard is not clear, it is not subject to uniform application by appellate courts, and the appellate decisions reviewing jury verdicts are likewise inconsistent. Second, the appellate decisions regarding the need and desirability of appropriate instructions are in conflict.

A. Inconsistent Evaluations of Evidence

The inconsistent treatment of unintentional killings by both juries and appellate courts is particularly clear in the reported decision of cases since 1988 involving unintended shooting deaths. In *Wheeler v. State*, the defendant fired a handgun repeatedly while fighting police for possession of it.⁴²⁴ The jury convicted the defendant of capital murder.⁴²⁵ The supreme court affirmed a murder conviction but narrowly overturned a capital murder conviction.⁴²⁶

In *Clark v. State*, the defendant shot through a locked steel door during an argument, killing the victim.⁴²⁷ The jury convicted of murder, and the supreme court affirmed.⁴²⁸ It further held that omission of a requested instruction on culpable negligence manslaughter was not error because the evidence was insufficient to support a finding of culpable negligence.⁴²⁹ In *Blanks v. State*, where the defendant claimed he shot and killed by accident, the jury convicted of manslaughter but not depraved heart murder.⁴³⁰ In affirming, the supreme court found no error in prosecuting the homicide as murder and concluded the evidence was sufficient to sustain either a murder or manslaughter conviction.⁴³¹

In *Tait v. State*, where the defendant held a cocked gun to

⁴²⁴ 536 So. 2d 1341, 1342 (Miss. 1988).

⁴²⁵ *Wheeler*, 536 So. 2d at 1342.

⁴²⁶ *Id.* at 1344.

⁴²⁷ *Clark v. State*, 693 So. 2d 927, 929 (Miss. 1997). Justice Banks concurred in the result without opinion. *Clark*, 693 So. 2d at 933 (Banks, J., concurring).

⁴²⁸ *Id.* at 933.

⁴²⁹ *Id.*

⁴³⁰ 547 So. 2d 29, 33 (Miss. 1989) (reversing conviction on matter of evidence).

⁴³¹ *Blanks*, 547 So. 2d at 34.

the victim's head, the jury convicted of murder.⁴³² But the supreme court reversed, holding these facts inadequate as a matter of law to support murder.⁴³³ In *Towner v. State*, the jury convicted of manslaughter where the shooting death resulted either from deliberate firing of a handgun or an accidental firing during a scuffle.⁴³⁴ The court of appeals affirmed, holding that no accident instruction was required or proper.⁴³⁵

In these cases juries have convicted defendants who claimed shooting deaths were unintended of capital murder, murder, and manslaughter.⁴³⁶ To be sure, jurors' differing resolution of issues of credibility as well as their different conclusions about risk and culpability may explain why one killing was found to be murder and another manslaughter. But appellate review of the verdicts appears no more predictable in its outcome. In these cases the supreme court has affirmed convictions of murder finding the evidence sufficient; reversed convictions of murder finding the evidence insufficient as a matter of law; rendered a verdict of manslaughter finding the evidence sufficient as a matter of law; affirmed convictions of manslaughter finding the evidence sufficient as a matter of law; and approved the omission of manslaughter instructions finding the evidence of manslaughter insufficient as a matter of law.

⁴³² 669 So. 2d 85, 87 (Miss. 1996).

⁴³³ *Tait*, 669 So. 2d at 91.

⁴³⁴ 97-KA-01176-COA, ¶ 4, 726 So. 2d 251, 254 (Miss. Ct. App. 1998).

⁴³⁵ *Towner*, 97-KA-01176-COA, ¶¶ 13-16, 726 So. 2d at 256. *But see* *Scott v. State*, 446 So. 2d 580, 583 (Miss. 1984) (holding failure to give accident instruction was reversible error where gun discharged during scuffle and instruction on excuse was limited to sudden combat).

⁴³⁶ Juries have undoubtedly also acquitted in accidental shooting cases finding the death accidental and excusable. A model instruction liberally permits this defense, though its statutory authority is problematic. *See* MODEL JURY INSTRUCTIONS, *supra* note 92, § 8:15 (directing finding of excusable homicide where jury finds accidental shooting without intent to kill).

B. Inconsistent Law Governing Jury Instructions

Manslaughter is a lesser included offense of murder.⁴³⁷ As the supreme court has explained, "Depraved heart murder and culpable-negligence manslaughter are distinguishable simply by degree of mental state of culpability. In short, depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied."⁴³⁸

Accordingly, there is no error in giving instructions on both depraved-heart murder and culpable negligence manslaughter.⁴³⁹ On the contrary, the supreme court has repeatedly approved giving both instructions in cases of unintentional criminal homicide in order to permit the jury, informed of different levels of culpability, to return a verdict for the most appropriate crime.⁴⁴⁰ In such cases it has emphasized the need for

⁴³⁷ More recent cases explain the difference between the two is that depraved heart murder requires a higher or more culpable form of risktaking or recklessness. *See infra* note 438. This was also true under older authority that explained that murder differed from manslaughter only in that it required deliberation (or malice aforethought), but manslaughter did not. *See Carter v. State*, 25 So. 2d 470, 473 (Miss. 1946).

⁴³⁸ *Windham v. State*, 602 So. 2d 798, 801 (Miss. 1992); *see Jones v. State*, 95-KA-01313-SCT, ¶ 35, 710 So. 2d 870, 878 (Miss. 1998) ("Malice too may be inferred when such a high degree of recklessness is involved, raising the level of the crime from 'culpable negligence' manslaughter to 'depraved heart' murder.") (citation omitted); *Clark v. State*, 693 So. 2d 927, 930 (Miss. 1997) (quoting *Windham*, 602 So. 2d at 801); *Hurns v. State*, 616 So. 2d 313, 320-32 (Miss. 1993) ("[Culpable negligence manslaughter] requires, and should, a much lesser showing of culpability than that required by the depraved heart murder section.").

⁴³⁹ *Windham*, 602 So. 2d at 801; *see also Johnson v. State*, 475 So. 2d 1136, 1148 (Miss. 1985) (holding there was no error or prejudice in giving culpable negligence manslaughter instruction where jury convicted of depraved heart murder) (citing *Flanagin v. State*, 473 So. 2d 482, 487 (Miss. 1985)).

⁴⁴⁰ *See, e.g., Clayton v. State*, 652 So. 2d 720, 726 (Miss. 1995); *Windham*, 602 So. 2d at 803; *Bass v. State*, 54 So. 2d 259, 262 (Miss. 1951); *Roberson v. State*, 121 So. 492, 492-93 (Miss. 1928).

In *Clayton*, the supreme court reversed a conviction of depraved heart murder where the jury was also instructed on culpable negligence manslaughter but where the instruction defined culpable negligence as requiring wilful acts. *Clayton*, 652 So. 2d at 724. The court specifically held, "Where the objective is to distinguish culpable negligence manslaughter from depraved heart murder the definition of culpable negligence should be limited to the definition given by this Court in *Hurns v. State*." *Id.* at 726. The court's opinion did not address the fact that

careful definition of culpable negligence in order to avoid confusing the jury.⁴⁴¹

From the court's reasoning, it follows that culpable negligence manslaughter instructions should be routinely given in all trials for depraved heart murder. First, a "defendant is entitled to have jury instructions given which present his theory of the case."⁴⁴² A defendant should be able to avoid murder liability for an unintentional homicide by persuading the jury that he or she was guilty of culpable negligence but lacked the depraved heart required for murder. "In homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of a judgment of conviction."⁴⁴³ Second, the failure to permit a jury to consider liability for a less serious offense requiring a less blameworthy form of risktaking can create strong pressure to convict the defendant of the more serious crime.⁴⁴⁴ Depriving jurors of the option of convicting of culpable negligence manslaughter thus aggravates the risk of wrongful convictions of depraved heart murder in unsympathetic cases—and cases involving un-

Hurns, notwithstanding a judicial definition of culpable negligence, had actually held that requested culpable negligence instructions were properly omitted. See *Hurns v. State*, 616 So. 2d 313, 321 (Miss. 1993). Accordingly, it is not clear whether the court in *Clayton* meant to overrule the result in *Hurns* or to limit it to its facts.

⁴⁴¹ *Clayton*, 652 So. 2d at 726. This is consistent with the court's insistence that deliberate design be carefully defined so as not to prevent a finding of voluntary manslaughter. See *Outlaw v. State*, 1999-KA-00461-SCT, ¶¶ 14-15, 797 So. 2d 918, 921 (Miss. 2001).

⁴⁴² *Heidel v. State*, 587 So. 2d 835, 842 (Miss. 1991). This rule has been cited with approval in *Jackson v. State*, 645 So. 2d 921, 924 (Miss. 1994) and *Goff v. State*, 98-KA-00723-COA, ¶ 5, 778 So. 2d 779, 781 (Miss. Ct. App. 2000).

⁴⁴³ *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995) (citing *Hester v. State*, 602 So. 2d 869, 872 (Miss. 1992)).

⁴⁴⁴ The Supreme Court discussed the pressure to convict a wrongdoer of a more serious offense in *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (holding due process requires lesser included offense instruction in prosecution for capital crime to avoid risk of wrongful conviction from jury faced with all-or-nothing choice); see also *Keeble v. United States*, 412 U.S. 205, 212-13 (1973) (reversing conviction of assault with intent to commit serious bodily injury where jury was not instructed on lesser included offense of simple assault).

sympathetic defendants.

Requiring lesser included offense instructions on culpable negligence manslaughter is consistent with the suggestion in an older case that a defendant prosecuted for deliberate design murder has a right to have the jury consider lesser manslaughter culpability based on culpable negligence.⁴⁴⁵ And it is strongly supported by the more recent holding that drunk drivers prosecuted for culpable negligence manslaughter were entitled to instructions on the (then) lesser included offense of aggravated DUI.⁴⁴⁶

Nevertheless, the supreme court has not consistently required culpable negligence manslaughter instructions in depraved heart murder prosecutions. In *Sanders v. State*, the defendant struck the victim once on the head with a hammer.⁴⁴⁷ The defendant later died.⁴⁴⁸ The jury was instructed on both deliberate design murder and depraved heart murder.⁴⁴⁹ The trial court refused to give a requested instruction on culpable negligence manslaughter.⁴⁵⁰ Affirming the murder conviction, Justice Mills found no error in the failure to give the requested instruction.⁴⁵¹ Justice Mills apparently viewed the evidence as supporting a finding of either deliberate design or of a reckless disregard far worse than culpable negligence.⁴⁵² But in doing so, he confused the issue of whether the evidence was sufficient to support a jury verdict of murder with the issue of whether the evidence could also have supported a verdict of manslaughter. To justify omitting the instruction, he

⁴⁴⁵ *Gaddis v. State*, 42 So. 2d 724, 726 (Miss. 1949) (holding where defendant, drunk and angry, shot his wife without adequate provocation, voluntary manslaughter instructions were properly denied but that claim of unintentional killing was properly presented by jury instruction of culpable negligence manslaughter).

⁴⁴⁶ *Whitehurst v. State*, 540 So. 2d 1319, 1326-27 (Miss. 1989) (discussing criteria for lesser included offense instructions and holding their omission reversible error under the circumstances). The statute there found to be a lesser included offense was subsequently amended to provide for more serious punishment. See *supra* notes 179-87 and accompanying text.

⁴⁴⁷ 1999-KA-01663-SCT, ¶ 5, 781 So. 2d 114 (Miss. 2001).

⁴⁴⁸ *Sanders*, 1999-KA-01663-SCT, ¶ 6, 781 So. 2d at 116.

⁴⁴⁹ *Id.* ¶ 15, 781 So. 2d at 119.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* ¶ 17, 781 So. 2d at 119-20.

⁴⁵² *Id.*

concluded that the evidence would not have been sufficient to support a finding of culpable negligence: "Viewing the evidence and all reasonable inferences therefrom, in a light most favorable to Sanders, a reasonable jury could not have found him guilty of mere culpable negligence."⁴⁵³

The court of appeals reached a similar result in *Goff v. State*.⁴⁵⁴ While the defendant's wife was on a phone outside a bar, the defendant observed the victim bump into her, knock her to the ground, and call her a name.⁴⁵⁵ She was not seriously injured.⁴⁵⁶ The defendant followed the victim and admitted he assaulted him.⁴⁵⁷ There was a dispute as to whether the defendant stomped on the victim's head after knocking him to the ground.⁴⁵⁸ The trial court denied the defendant's request for a culpable negligence instruction, and the jury convicted him of depraved heart murder.⁴⁵⁹ The court of appeals affirmed, opining that "there was no evidence to submit the case to the jury on the theory of culpable negligence, and denying the instruction was not error."⁴⁶⁰

The legal reasoning in these opinions defies logic, for evidence sufficient to support the greater offense must (by definition) be sufficient to support the lesser included offense. Speculation that certain risktaking is too great to be merely negligent is questionable, as it seems to rest on the premise that an intentional act having unintentional consequences cannot be culpable negligence.⁴⁶¹ This premise would eliminate most if not all cases of culpable negligence, since acts or omissions causing death are always preceded by intentional conduct. Moreover, the relevant manslaughter statute expressly covers deaths caused by any "act, procurement, or culpable negli-

⁴⁵³ *Id.* ¶ 17, 781 So. 2d at 120.

⁴⁵⁴ 98-KA-00723-COA, 778 So. 2d 779 (Miss. Ct. App. 2000).

⁴⁵⁵ *Goff*, 98-KA-00723-COA, ¶ 3, 778 So. 2d at 781.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* ¶ 13, 778 So. 2d at 783.

⁴⁵⁹ *Id.* ¶¶ 5-6, 778 So. 2d at 781-82.

⁴⁶⁰ *Id.* ¶ 6, 778 So. 2d at 782.

⁴⁶¹ *See id.* ("An intentional act that causes death cannot constitute culpable negligence.") (citing *Hurns v. State*, 616 So. 2d 313, 321 (Miss. 1993)).

gence⁴⁶² and intentional acts, including assaults, have repeatedly resulted in convictions for culpable negligence manslaughter.⁴⁶³

The results in cases like *Sanders* and *Goff* appear to be motivated by the judicial desire to save the state the inconvenience and costs of a new trial. But the courts' rationalization of these decisions has introduced theoretical incoherence into the law of jury instructions to the extent that the courts have reasoned that evidence sufficient to support a finding of depraved heart murder is insufficient to support a finding of culpable negligence. Moreover, these decisions seriously erode the role of the jury as factfinder of material elements of mens rea. A jury, properly instructed, not appellate courts, should determine the elements of the offense, including the appropriate level of culpability.

Because lesser included offense instructions materially assist the jury's determination of the appropriate mens rea, there is no good reason not to give such instructions when requested by either the state or the defendant. The supreme court should resolve all uncertainty and follow those cases approving lesser included culpable negligence instructions. It should specifically overrule *Clark*⁴⁶⁴ and *Sanders*⁴⁶⁵ and declare that the failure to give culpable negligence manslaughter instruction in depraved heart murder cases, when requested, is reversible error. When a defendant does not request such instruction, however, the trial court's failure may not be reversible error.⁴⁶⁶

In cases prosecuted on a theory of deliberate design, a

⁴⁶² See *supra* note 196 and accompanying text.

⁴⁶³ See *supra* notes 390-99 and accompanying text.

⁴⁶⁴ *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

⁴⁶⁵ *Sanders v. State*, 1999-KA-01663-SCT, 781 So. 2d 114 (Miss. 2001).

⁴⁶⁶ *Fairman v. State*, 513 So. 2d 910, 914 (Miss. 1987) (affirming murder conviction and holding omission of manslaughter instruction not error where appellant submitted instruction that trial court would have given but then withdrew the request as part of trial gamble that jury would acquit rather than convict of murder); *Towner v. State*, 97-KA-01176-COA, ¶ 9, 726 So. 2d 251, 255 (Miss. Ct. App. 1998) (holding defense's duty to preserve error required request for culpable negligence manslaughter instruction and thus finding no error where defendant withdrew request for instruction).

lesser included offense instruction on culpable negligence manslaughter need not be given.⁴⁶⁷ But if the state introduces alternative theories of deliberate design and depraved heart, then a culpable negligence instruction should be given.⁴⁶⁸ For example, in *Hurns* death resulted from an aggravated assault during which the defendant might or might not have had the intent to kill.⁴⁶⁹ The jury was instructed on both deliberate design and depraved heart murder but not on culpable negligence manslaughter.⁴⁷⁰ The court affirmed the murder conviction despite the omission of a requested instruction on culpable negligence manslaughter, remarking that "evidence in this case shows intentional, not negligent, acts committed by [defendant]."⁴⁷¹ But the court did not explain how it could read the record on appeal to conclude that the jury had imposed murder liability under a theory of deliberate design as opposed to extreme recklessness. If the court cannot determine that a verdict was based on deliberate design, then the omission of a requested culpable negligence manslaughter instruction should be reversible error.

CONCLUSION

While Mississippi statutes differentiate between depraved heart murder and culpable negligence manslaughter, the judicial opinions construing these statutes have not coherently distinguished between the mens rea elements for murder and manslaughter. Nor have the appellate courts followed a consistent practice as to when the determination of these elements should be left to the factfinder. This has resulted in theoretical uncertainty about the relationship of depraved heart murder and culpable negligence manslaughter and in practical confusion about the evidence necessary to support convictions of either crime.

Aggravated by the courts' flagging attention to precedent,

⁴⁶⁷ *Hurns v. State*, 616 So. 2d 313, 320 (Miss. 1993).

⁴⁶⁸ *Hurns*, 616 So. 2d at 320.

⁴⁶⁹ *Id.* at 315-17.

⁴⁷⁰ *Id.* at 320.

⁴⁷¹ *Id.* at 321.

the law regulating jury instructions and appellate review of evidence in unintentional homicide cases presently fails to achieve a minimal level of coherence or to offer articulable rules of general application that can be applied uniformly by the courts. Even if the decisions are not based on such individual considerations that they are vulnerable to constitutional challenge,⁴⁷² the prevailing confusion and uncertainty is undesirable as a matter of law, justice, and policy.

A. Statutory Reform

The prevailing confusion provides an opportunity for those seeking a comprehensive revision of the state's homicide statutes.⁴⁷³ One option would be to follow the Model Penal Code and other modern authority and define murder as requiring an actual subjective awareness of risk of death.⁴⁷⁴ Legislation could then differentiate involuntary manslaughter from unintentional murder in one of two ways. First, the legislature

⁴⁷² In addition to due process and vagueness challenges, the recent decision *Bush v. Gore* may suggest creative equal protection challenges where neither the trial courts nor appellate courts provide clear criteria for determining a material element of the offense. 531 U.S. 98, 105-06 (2000) (holding that state appellate court mandate to determine intent of individual voters violated equal protection in absence of specific standards to assure equal application).

⁴⁷³ For a discussion of efforts to revise the code, see James L. Robertson & Michael H. Hoffheimer, *Bar Committee Undertakes Rewrite of Criminal Code*, MISS. LAW., May-June 1994, at 12-15. Judge Tucker urges revising the South Dakota homicide statutes, which contain a provision similar to Mississippi's depraved heart murder. See Tim Dallas Tucker, *State v. Black: Confusion in South Dakota's Determination of Lesser Included Offenses in Homicide Cases*, 41 S.D. L. REV. 465, 495 (1996).

⁴⁷⁴ The Model Penal Code limits conscious risk creation to manslaughter and murder (when it evinces extreme indifference to the value of human life) but permits a conviction of negligent homicide without such awareness of risk. See generally MODEL PENAL CODE § 210.4 cmt. 3, at 85-88 (1980). Canadian constitutional law permits a conviction of murder only with proof of a subjective foresight of death. *R. v. Martineau*, [1990] 2 S.C.R. 633, 634 ("The principles of fundamental justice require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death."). See generally Ted Carlton, *A Principled Approach to the Constitutional Requirement of Fault*, 24 OTTAWA L. REV. 613 (1992); Nancy K. Thomson, *Fundamental Justice, Stigma, and Fault*, 52 U. TORONTO FAC. L. REV. 379, 380-81, 390-92 (1994). England also requires intent to kill or to inflict serious injury for murder. See *supra* note 42 and accompanying text.

could define manslaughter as not requiring actual awareness of risk of death. Second, it could distinguish murder from manslaughter by requiring additional aggravating elements for murder or by specifying that the risktaking for murder evidence a more blameworthy callousness or indifference. If reformers require conscious risktaking for manslaughter, then legislation should include a new crime, comparable to the Model Penal Code's negligent homicide, in order to cover those homicides, previously treated as murder or manslaughter, that occur without convincing proof of awareness of risk.

The mid-twentieth century preference for subjective standards of criminal culpability offers a convenient way of distinguishing murder and manslaughter. But requiring subjective awareness of risk raises philosophical and practical issues.⁴⁷⁵ And to resort to a subjective standard would represent a departure from longstanding authority while conflicting with the strong judicial preference for objective standards of homicide culpability announced in other contexts.⁴⁷⁶

Short of comprehensive revision of homicide statutes, the legislature could do much to help clarify the application of existing statutes through more modest amendments to the existing code. First, the legislature should clean up the code by repealing those statutes that have been unnecessary since 1857. These include the statutes that by their terms duplicate the elements of involuntary⁴⁷⁷ and voluntary⁴⁷⁸ man-

⁴⁷⁵ See *supra* note 1 and text accompanying note 263.

⁴⁷⁶ See, e.g., *Taylor v. State*, 452 So. 2d 441, 450 (Miss. 1984) (affirming exclusion of expert testimony offered to show that murder defendant's abnormal mental condition prevented ability to form malice or deliberate design); see also *Greenlee v. State*, 97-KA-00507-SCT, ¶¶ 15-16, 725 So. 2d 816, 823 (Miss. 1998) (holding hallucination due to voluntary intoxication did not provide defense); *McDaniel v. State*, 356 So. 2d 1151, 1156 (Miss. 1978) (holding voluntary intoxication unavailable as general defense where defendant is sane when sober). See generally Jim Neeld et al., Note, *Supreme Court Review-Criminal Law*, 55 MISS. L.J. 77, 84-90 (1985) (exploring issue of whether expert testimony should be introduced as evidence to reduce murder to manslaughter).

⁴⁷⁷ All killings prohibited by Mississippi Code sections 97-3-27 ("while such other is engaged in the perpetration of any felony, except those felonies enumerated"), 97-3-29 ("while such other is engaged in the perpetration of any crime or misdemeanor not amounting to felony . . . where such killing would be murder at common law"), and 97-3-33 ("while such human being is engaged in the commis-

slaughter. They also include statutory forms of manslaughter that require a culpable mental state worse or higher than culpable negligence.⁴⁷⁹ Such unnecessary statutes probably in-

sion of a trespass or other injury to private rights or property") require that the death occur as the result of the killer's "act, omission, or culpable negligence" and are thus by their terms within the general prohibition of section 97-3-47 (covering "[e]very other killing . . . by the act, procurement, or culpable negligence of another"). MISS. CODE ANN. §§ 97-3-27, -29, -33, -47 (2000). The need for separate statutes grew out of their classification in 1839 as different degrees of manslaughter, punished differently. This disappeared in 1857. *See supra* text accompanying note 120. They have become superfluous as the statute originally drafted to cover residual kinds of killings has evolved into a general involuntary manslaughter statute. *See supra* notes 193-95 and accompanying text. And they have tended either to fall into desuetude or to resurface in the hands of clever defense counsel to the confusion and embarrassment of the courts. *See supra* note 119 (discussing cases).

The statute punishing as manslaughter killings without design by intoxicated persons practicing medicine, MISS. CODE ANN. § 97-3-39, does not specify a culpable mental state but should not be assumed to thereby impose strict liability. Given the age of the statute, its drafters most likely understood it to require at least culpable negligence. The legislature should either repeal the statute if it requires culpable negligence or amend it to specifically provide for strict liability.

⁴⁷⁸ Manslaughter for "unnecessarily" killing a victim who was committing a felony or doing an unlawful act has produced particular confusion. This statute (which does not include language of "without malice") was probably designed to mitigate deliberate design killings of wrongdoers from murder to manslaughter when they occurred in the absence of circumstances constituting excusable or justifiable homicide. The court has nevertheless held that the killing of a wrongdoer with "malice" constitutes murder not manslaughter. *See Caldwell v. State*, 381 So. 2d 591 (Miss. 1980) (reversing capital murder conviction where trial court omitted defense theory that killing of police officer during unlawful arrest should be mitigated to manslaughter); *cf. Bangren v. State*, 17 So. 2d 599, 600 (Miss. 1944), *overruled on other grounds*, *Ferrell v. State*, 97-KA-00941-SCT, 733 So. 2d 788 (Miss. 1999); *Walker v. State*, 189 So. 804, 806 (Miss. 1939) (killing without malice of person making improper arrest could not be murder).

The court's implicit requirement of lack of malice dispenses with the need for this statute. It is hard to imagine any killing that is not mitigated under the voluntary manslaughter statute, MISS. CODE ANN. § 97-3-35, that deserves to be mitigated.

⁴⁷⁹ The killings by overloading boats for gain require either "wilfully or negligently" receiving so many passengers and other elements. MISS. CODE ANN. § 97-3-41. The statute concerning operators of steamboats and steam railroad engines does prohibit certain acts that occur through "ignorance or gross neglect," the scope of which is uncertain but may arguably be satisfied by proof of something less than culpable negligence. *See id.* § 97-3-43.

But the application of these statutes is extremely limited. Their mens rea element is problematic. And it is hard to imagine cases prosecuted under them

clude all the manslaughter statutes except the general voluntary and involuntary manslaughter statutes, the statute imposing manslaughter liability on owners of dangerous animals,⁴⁸⁰ and the statute criminalizing causing death of unborn quick children and causing miscarriage or stillbirth of embryos and fetuses.⁴⁸¹

Second, the legislature could eliminate the language of "without malice" from the voluntary manslaughter statute to make clear that the state bears no burden of disproving malice and that manslaughter is both legally and literally included in the definition of murder.⁴⁸² The residual ("[e]very other kill-

that do not otherwise satisfy the current standard of culpable negligence.

⁴⁸⁰ The statute requires proof both that the defendant knew the dangerous propensity of the animal and willfully allowed it to run at large or kept it without ordinary care. *Id.* § 97-3-45. These are higher culpability requirements than culpable negligence. Nevertheless, the statute serves an important purpose by imposing manslaughter liability for resulting deaths that might be difficult to establish under normal causation requirements in the absence of the statute.

⁴⁸¹ *Id.* § 97-3-37; see *supra* notes 172-78 and accompanying text.

⁴⁸² MISS. CODE ANN. § 97-3-35. The supreme court has altered the original understanding of this statute in suggesting that it imposes alternative grounds for mitigating murder to manslaughter—either lack of malice (which it identified with "heat of passion") or dangerous weapon. See *Lanier v. State*, 684 So. 2d 93, 97 (Miss. 1996) (reversing capital murder conviction where defendant claimed he unintentionally killed police officer victim while resisting unlawful arrest). But see *Johnson v. State*, 416 So. 2d 383 (Miss. 1982) (holding trial court properly refused manslaughter instruction not warranted by evidence and omitting deadly weapon requirement). While the court in *Lanier* decided the appeal by construing the elements of the voluntary manslaughter statute, the real issues were: 1) May a defendant use force or deadly force to resist an unlawful arrest by a police officer, and, if not, does the force or excessive force mitigate murder to manslaughter? And 2) did the defendant have sufficient mens rea for murder in shooting at victim? The court required an instruction permitting manslaughter for imperfect self-defense. *Lanier*, 684 So. 2d at 93.

The existence of heat of passion negating "malice" should be a matter for the jury once there is sufficient evidence from which a factfinder may infer either deliberate design or depraved heart. See *Jordan v. State*, 513 So. 2d 574, 575 (Miss. 1987) (affirming manslaughter conviction of defendant who killed wife's lover); *Rogers v. State*, 76 So. 2d 702, 704 (Miss. 1955) (stating that grade of homicide should be left to jury); *Anderson v. State*, 25 So. 2d 474, 476 (Miss. 1946) (leaving grade of homicide to jury); cf. *Windham v. State*, 520 So. 2d 123, 126 (Miss. 1987) (holding deliberate design instruction conflicted with definition of manslaughter as killing without malice in heat of passion). Likewise, the adequacy of provocation should generally be left to the jury. See *Ruffin v. State*, 444 So. 2d 839, 841 (Miss. 1984) (holding evidence of defendant arguing with wife and in

ing") language of the involuntary manslaughter statute should also be repealed to remove any suggestion that the statute might not apply when another does.⁴⁸³

B. Judicial Clarification

Unintentional homicide statutes similar to Mississippi's have proven remarkably durable and resisted waves of reform. Florida, Minnesota, New Mexico, Oklahoma, and South Dakota⁴⁸⁴ preserve unintentional murder statutes similar to Mississippi's. Furthermore, Florida and Oklahoma retain statutes defining involuntary manslaughter as homicide resulting from the defendant's "act, procurement, or culpable negligence."⁴⁸⁵

agitated state before shooting her sufficient to support manslaughter instruction). Legislation should prevent appellate courts from finding that evidence of a hot-blooded intentional killing is insufficient as a matter of law to support murder. *But cf.* *Rowland v. State*, 35 So. 826, 827 (Miss. 1904) (reversing murder conviction on theory that presence of adequate provocation prevented jury finding of deliberate design).

⁴⁸³ The state relied on this confusing language to support its murder conviction in *Windham*, arguing that the omission of culpable negligence instructions was proper because section 97-3-47 "specifically excludes homicides falling under § 97-3-19(1)(b)." *Windham v. State*, 602 So. 2d 798, 801 (Miss. 1992). The court implicitly rejected the argument that depraved heart murder and culpable negligence manslaughter are mutually exclusive. *Windham*, 602 So. 2d at 801. It insisted, on the contrary, that they differed only in the degree of culpable recklessness. *Id.* The state's argument would have similar undesirable consequences in cases involving drunk driving deaths where the state should have the option of prosecuting for either aggravated DUI, culpable negligence manslaughter, or depraved heart murder.

⁴⁸⁴ FLA. STAT. ANN. § 782.04(2) (West Supp. 2001) (defining second degree murder as homicide "perpetrated by an act imminently dangerous to another and evincing a depraved mind"); MINN. STAT. ANN. § 609.195(a) (West Supp. 2000) (defining third degree murder as "perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life"); N.M. STAT. ANN. § 30-2-1 (Michie 1992) (defining first degree murder as homicide "by any act greatly dangerous to the lives of others, indicating a depraved mind, regardless of human life"); OKLA. STAT. tit. 21, § 701.8 (1983) (defining second degree murder as homicide "perpetrated by an act imminently dangerous to another person and evincing a depraved mind regardless of human life"); S.D. CODIFIED LAWS § 22-16-7 (Michie 1998) (defining second degree murder as homicide caused by "act imminently dangerous to others and evincing a depraved mind"); *see also id.* § 22-16-8 (prescribing no intent to injure requirement for depraved mind murder). *See generally* Romero, *supra* note 243; Tucker, *supra* note 473, at 495.

⁴⁸⁵ FLA. STAT. ANN. § 782.07(1) (defining manslaughter); OKLA. STAT. tit. 21,

Mississippi appellate courts have more than 160 years experience in interpreting the depraved heart murder and culpable negligence manslaughter statutes. They adapted them to altered circumstances and are capable of resolving the current confusion by appropriate judicial clarification. The courts must explain the difference between the risktaking required for unintentional murder and manslaughter. While they could do so in any number of ways consistent with their judicial authority to interpret and clarify legislation, the simplest way would be to modify the current definition of culpable negligence, which already finds its source in case law. Rather than requiring conscious disregard of probable fatal consequences or indifference to the safety of human life,⁴⁸⁶ the court might redefine culpable negligence as either acts (with or without awareness) that create a high probability of death or acts accompanied by the conscious awareness of the probability of serious injury.

This modest redefinition would differentiate culpable negligence from the higher risktaking evidencing a disregard of life required for murder. The difference could be helpfully reinforced by appropriate jury instructions.⁴⁸⁷ The instructions should eliminate once and for all any reference to "malice" in keeping with the language of the statutes, the intent of the legislatures in 1839 and 1857, and common sense.

Equally important, appellate courts should leave the determination of the level of culpability to the jury. They should require culpable negligence manslaughter instructions in all prosecutions for depraved heart murder. But they should not reverse verdicts supported by sufficient evidence when appropriate instructions have been given.

§ 716 (defining second degree manslaughter).

⁴⁸⁶ See *supra* note 368 and accompanying text.

⁴⁸⁷ For example, depraved heart murder could be defined as requiring either an act (with or without awareness) that created a high probability of death so as to evidence a disregard for human life or an act creating a risk of death accompanied by evidence of actual awareness of risk of death so as to evidence a disregard for human life.

SLAVE LAW IN MISSISSIPPI FROM 1817-1861: CONSTITUTIONS, CODES AND CASES

*Michael P. Mills**

We need to talk, to tell, since oratory is our heritage. We seem to try in the simple furious breathing (or writing) span of the individual to draw a savage indictment of the contemporary scene or to escape from it into a make-believe region of swords and magnolias and mockingbirds which perhaps never existed anywhere.¹

Adam Smith, in his classic study of economic theory, *The Wealth of Nations*, states:

That system which represents the produce of land as the sole source of the revenue and wealth of every country has, so far as I know, never been adopted by any nation It would not, surely, be worth while to examine at great length the errors of a system which never has done, and probably never will do, any harm in any part of the world.²

* Judge, United States District Court for the Northern District of Mississippi. A special thanks is in order to Dr. Michael F. Holt, Professor of American History and Chair of the History Department of the University of Virginia for patiently guiding me along in writing this paper. I also owe much to my former Mississippi History professor, Dr. David Sansing, professor emeritus of the University of Mississippi. Any errors herein are mine since neither of them read the final draft. And a big thanks to my patient, efficient and talented judicial assistant, Sharon Smith.

¹ William Faulkner, *An Introduction to The Sound and the Fury*, MISS. Q. 26 (Summer 1973), reprinted in WILLIAM FAULKNER, *THE SOUND AND THE FURY* 222 (David Minter ed., W.W. Norton & Co. 1987) (1929).

² 2 ADAM SMITH, *THE WEALTH OF NATIONS* 156-57 (Everyman's Library, Alfred A. Knopf, Inc. 1958) (1775).

Adam Smith had not imagined Nineteenth Century Mississippi. "Cotton, slavery, and the plantation system—these were the dominant elements in Mississippi's agricultural economy from the time of statehood until the Civil War."³ Historically, Mississippi led the nation in production of cotton, and that cotton was planted and picked by slave labor. By the dawn of war in 1859, the five leading cotton producing states ranked as follows:

<i>State</i>	<i>Ginned Cotton in Bales of 400 lbs.</i>
Mississippi	1,202,507
Alabama	989,955
Louisiana	777,738
Georgia	701,840
Texas	431,463 ⁴

Southern cotton exports represented fifty-seven percent of all American exports.⁵ It is fair to ask how one state, in a time of emerging notions of the rights of mankind, could so completely institute and develop not only an economy, but a way of life, based upon human bondage. To explore this query, some perspective of who the founding Mississippians were and how they resembled or differed from their fellow Americans is in order.

Mississippi was governed by a succession of Indian, Spanish, French and English regimes prior to December 10, 1817, when roughly the lower third of the present state was admitted to the Union as a slave state. The early Mississippians found themselves surrounded by Choctaw and Chickasaw nations to the north, the Alabama territory to the east and the State of Louisiana and the Arkansas territory to the west. Texas was still part of Mexico. Mississippi was little more than an English speaking outpost of the federal government in a land surrounded by French, Spanish and Native American cultures. Yet

³ 1 A HISTORY OF MISSISSIPPI 310 (Richard Aubrey McLemore ed., 1973).

⁴ *Id.* at 321.

⁵ BRUCE CATTON, THE CIVIL WAR 3 (1980).

amidst these diverse languages, laws and pried beliefs, one institution had long become a norm: slavery. Human bondage was the common thread weaving the early Mississippi plantation and frontier societies together. Slave labor led the Mississippi race to create a cotton kingdom. These slaves were not always Africans. In earlier days, the Chickasaw Indians had taken Choctaw slaves; the Choctaws took the Natchez; and the Spaniards and French had sought to enslave all the Indians without profitable success, until finally, in the early 1700s, wealthy French colonialists began importing Africans to labor in their deep south fields.⁶ African labor became the human staple needed to open the rich alluvial farmlands which promised swift upward mobility for immigrants from northern and southern states and other nations who sought their fortunes in the Mississippi Territory in the late 1700s and the early 1800s. Soon enough, all the slaves were people of African ancestry, though not all slaveholders were white. By 1830, some of the wealthiest land and slave owners in the state were Indians. Hindsight affords us the luxury of condemning a way of life which inarguably created many of the social and economic ills we suffer today in Mississippi. However, we often overlook the socially debilitating effects slavery had on life in antebellum Mississippi.

Early Mississippi literature pictures a society driven by a lust for quick riches based on the production of cotton. Joseph G. Baldwin stated of Mississippi that

[m]arvellous accounts had gone forth of the fertility of its virgin lands; and the productions of the soil were commanding a price remunerating to slave labor as it had never been remunerated before.⁷

J.H. Ingraham, an early traveler to the Deep South, wrote that

[a] plantation well stocked with hands, is the *ne plus ultra* of every man's ambition who resides at the south. Young

⁶ JAMES W. LOEWEN & CHARLES SALLIS, *MISSISSIPPI: CONFLICT AND CHANGE* 66 (1974).

⁷ JOSEPH G. BALDWIN, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI* 82 (Lewis P. Simpson ed., La. State Univ. Press 1987) (1853).

men who come to this country, 'to make money,' soon catch the mania, and nothing less than a broad plantation, waving with the snow white cotton bolls, can fill their mental vision, ... Hence the great number of planters and the few professional men of long or ancient standing in their several professions. As soon as the young lawyer acquires sufficient to purchase a few hundred acres of the rich alluvial lands, and a few slaves, he quits his profession at once, though perhaps just rising into eminence, and turns cotton planter

Physicians make money much more rapidly than lawyers, and sooner retire from practice and assume the planter. They, however, retain their titles, so that medico-planters are now numerous, far out-numbering the regular practitioners, who have not yet climbed high enough up the wall to leap down into a cotton field on the other side. Ministers, who constitute the third item of the diploma'd triad, are not free from the universal mania, . . . The merchant moves onward floundering through invoices, ledgers, packages, and boxes. The gin wright and the overseer, also have an eye upon this Ultima Thule, while the more wealthy mechanics begin to form visions of cotton fields, and talk knowingly upon the 'staple.' Even Editors have an eye that way.⁸

The dissipating effects of slavery are revealed in the correspondence of Seargent Smith Prentiss who migrated to Natchez in 1827 and became not only a nationally prominent Whig politician and brilliant Mississippi attorney but also the premier *bon vivant* of early Mississippi society.⁹ Prentiss wrote his mother in February of 1828:

I do not like the manner of living here, so well as I do our Northern fashion. The white people themselves differ very little, as I can perceive, from those of our own part of the country. Slavery is the great pest of this as well as all the other Southern States. It is considered disgraceful for a white man to do any kind of hand labor-everything is done by the slaves. Of course, things are done in a very poor and slovenly manner; and, though the people here are far wealthier than

⁸ CHARLES S. SYDNOR, *SLAVERY IN MISSISSIPPI 186-87* (1933).

⁹ See generally 1 A MEMOIR OF S.S. PRENTISS (George Lewis Prentiss ed., 1855).

they are in the North, yet I do not think they live so comfortably or so happily. The negroes themselves, however, appear to enjoy life, and are, for aught I see, as happy as their masters. It is not often that they are treated so cruelly as we are accustomed to suppose, and in general they are better off than they would be if they were free—still it is a hard case for them at best.¹⁰

Ten years later, Prentiss's views of the slave condition had changed. He wrote his brother William in 1838 that

[t]he houses of the planters, notwithstanding their wealth, are not better than those of our common farmers. They are, usually two or three miles distant from each other, and each one surrounded by some ten, twenty or thirty negro cabins, which are the very pictures of misery and filth.¹¹

George Lewis Prentiss gives his own account of Mississippi in the 1820s and 1830s:

The emigrant character of a large part of the population, the adventurous spirit of the new-comers, most of whom were young men in quest of fortune, the absence of many of those restraining influences and domestic habits which mark an old established community, the sharp competitions of business and professional rivalries, almost wholly unchecked by previous acquaintances or familiar ties of friendship and kindred—these, with similar causes, naturally engendered a peculiar and anomalous state of society. Every man stood on the arena of life, alone and unpropped; his sole armor was his own native strength of will, courage and intellectual prowess. If he lacked either mental or physical nerve, the gate of fortune seemed barred against him . . .

The vices which usually infest such a condition of society, were not wanting here; intemperance, skepticism, profaneness, gambling, and fashionable dissipation—not to speak now of dueling—were sadly prevalent.¹²

Prentiss's account is matched again by Baldwin:

¹⁰ *Id.*

¹¹ *Id.* at 74-75.

¹² *Id.* at 129-31 (footnote omitted).

In short, the country had got to be a full ante-type of California, in all except the gold. Society was wholly unorganized: there was no restraining public opinion: the law was well-nigh powerless—and religion scarcely was heard of except as furnishing the oaths and *technics* of profanity. The world saw a fair experiment of what it would have been, if the fiat had never been pronounced which decreed subsistence as the price of labor.

Money, got without work, by those unaccustomed to it, turned the heads of its possessors, and they spent it with a recklessness like that with which they gained it. The pursuits of industry neglected, riot and coarse debauchery filled up the vacant hours. "Where the carcass is, there will the eagles be gathered together;" and the eagles that flocked to the Southwest, were of the same sort as the *black eagles* the Duke of Saxe-Weimar saw on his celebrated journey to the Natural Bridge. "The cankers of a long peace and a calm world"—there were no Mexican wars and filibuster expeditions in those days—gathered in the villages and cities by scores.¹³

The above-quoted writings of Baldwin, Prentiss and Ingraham focus on life on the large plantations and in the locally sophisticated cities of Natchez and Vicksburg. Large portions of Mississippi however, remained a frontier society until the Civil War. A glimpse of antebellum hill country life is found in the private journals of Josiah Hinds.¹⁴ In 1840, Hinds, who had recently settled in Itawamba County, wrote:

We are among strangers now in a strange land, and in a wild[er]ness, where but a short time since was heard the yell of the savage, and where the hoot of the owl and the prowl of the wolf if still heard. We are almost in the woods—one cabin [sic] only [sic] to shelter us and our little ones, and a rail pen for a smoke house and kitchen, a few neighbors who are kind but ignorant, (and) no churches erected for the worship of God.¹⁵

¹³ BALDWIN, *supra* note 7, at 84.

¹⁴ See Journal of Josiah Hinds (April 24, 1839 - July 10, 1863) (on file with Cossit Library of Memphis, Tennessee).

¹⁵ *Id.* at 67.

Hinds frets throughout his journal of alcohol abuse by his neighbors and the lack of established churches, though he seemed to have accepted slavery as a natural phenomenon.¹⁶

Commercial literature of the times provides such jewels as "negro raising must be conducted as a business separate from and unconnected with the market crop."¹⁷

Religious life, like society in general and the commercial world, was also stained by the institution of slavery. The religious population of Mississippi in 1850 consisted of a Baptist population of 38%; Methodist 41%; Presbyterian 16%; and Episcopalians and Catholics totaling nearly 3%.¹⁸ In the early days of statehood, each of these denominations interacted and shared a common faith with their northern neighbors.¹⁹ By 1845, however, splits had occurred in the majority denominations as a result of slavery.²⁰ The first to split were the Baptists.²¹ In 1844, the Baptist Triennial Convention rejected a Georgia man, James E. Reeves, as a missionary because he was a slaveholder.²² Alabama Baptists reacted angrily demanding his appointment.²³ The Foreign Board denied his appointment stating that "if . . . anyone should offer himself as a missionary, having slaves, and should insist on retaining them as his property, we could not appoint him."²⁴ The Baptists from the southern states rebelled, formed the Southern Baptist Convention, and, thereafter, resolved to "go everywhere preaching the gospel."²⁵ In the same year, the Methodist Episcopal South

¹⁶ *Id.*

¹⁷ JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* 143 (1990).

¹⁸ JOHN MCCARDELL, *THE IDEA OF A SOUTHERN NATION: SOUTHERN NATIONALISTS AND SOUTHERN NATIONALISM, 1830-1860*, at 350 (1979).

¹⁹ *Id.* at 178.

²⁰ *Id.*

²¹ *Id.* at 192.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 192 (quoting WILLIAM GOODELL, *SLAVERY AND ANTI-SLAVERY* 500-01 (1852)).

²⁵ *Id.* at 193.

denomination was established, and southern Presbyterians also split from their northern neighbors.²⁶

Slavery not only split churches; the slavery ethos also infected higher education. One passing example is that of Frederick A.P. Barnard from Massachusetts who served as professor of mathematics at the University of Mississippi and had been a slaveholder since 1838.²⁷ He was elected to the presidency of the University of Mississippi in 1854 but was later ostracized for his apparent fair-mindedness.

While investigating a student's assault on one of his black female servants, Barnard, contrary to state law, accepted the Negro's version of the story as testimony. Though "cleared" by the university trustees, Barnard remained troubled by the unseemly affair and left Mississippi for New York's Columbia College in 1861.²⁸

The effects of slavery on rich and poor alike in cultural, commercial and religious affairs in Mississippi are poignantly consistent with the personal account of slavery of Frederick Douglass, who wrote in 1855:

There are no conflicting rights of property, for all the people are owned by one man; and they can themselves own no property. Religion and politics are alike excluded. One class of the population is too high to be reached by the preacher; and the other class is too low to be cared for by the preacher. The poor have the gospel preached to them, in this neighborhood, only when they are able to pay for it. The slaves, having no money, get no gospel. . . . The rich planter can afford to learn politics in the parlor, and to dispense with religion altogether.²⁹

In 1816, the total population of the Mississippi Territory consisted of 45,085 free whites, 366 "free colored" and 30,061 slaves.³⁰ By 1860, these numbers had increased to 353,899

²⁶ *Id.* at 199.

²⁷ *Id.* at 207.

²⁸ *Id.*

²⁹ FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 45-46 (1855).

³⁰ DUNBAR ROWLAND, THE OFFICIAL AND STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI 66-67 (Centennial ed. 1917).

whites and 436,631 slaves.³¹ In some Mississippi counties, such as Issaquena and Washington, slaves out-numbered whites by more than ten to one.³² This paper examines the means by which the two antebellum state constitutions, legislative acts and selected appellate court cases manipulated the written word to enounce sometimes brutal, sometimes solicitous, rules of law to make the peculiar and immoral institution of chattel slavery profitable for slave owners and bearable for bondsmen. Ultimately, it is the tale of a people who acquiesced in a way of life wedded to economic benefits to be gained from chattel ownership of others. In a word: greed. Greed spawned slavery which simply became the dominant institution in the life of antebellum Mississippians. The pernicious grasp of this immoral ethos warped and twisted all other institutions; whether legal, social or religious. The times made the men. Eternal virtues and obvious truths became secondary to greed, and ultimately greed sired fear. By 1861, the people of Mississippi lived in a state of constant fear. Fear of losing wealth. Fear of slave rebellion. In the end, slavery brought about their downfall.

SLAVERY IN MISSISSIPPI: A FEDERAL INSTITUTION

The Union was established and the United States Constitution written with full recognition of the existence and legality of slavery as a state-optional institution. The United States Constitution is peppered with direct and oblique references to slavery. Article I, Section 2, provides the manner of choosing representation to Congress and specifically delineates between free persons and "three fifths of all other persons."³³ Section 9 of the same Article banned congressional interference with the foreign slave trade until 1808 but specifically allowed Congress to tax the importation of slaves.³⁴ Article IV, Section 2, clause 3, provided for the return of fugitive slaves from free states to

³¹ *Id.* at 721.

³² KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 32 (1956).

³³ U.S. CONST. art. I, § 2, cl. 3.

³⁴ *Id.* § 9, cl. 1.

slave states.³⁵ Other provisions related to slavery include the rights to form militias and bear arms found in the Second and Fifth Amendments which were enacted in part to enable states to put down slave insurrections.³⁶ In short, as wrong-headed as the notion may now seem, southern slave states assumed the constitutional legitimacy of state-option slavery as surely as they assumed their rights to regulate the sale of whiskey or mules, and most Northerners concurred. In fact, the peculiar institution was not as peculiar to the South as we may sometimes believe. Mississippi had been a member of the Union ten years before the State of New York abolished slavery in 1827.³⁷ Pennsylvania phased in a gradual abolition of slavery starting in 1780,³⁸ but that did not abolish slavery outright.³⁹ Slaves born after the law was passed were only allowed to go free until they had served their masters for twenty-eight years.⁴⁰ Delaware initially rejected the Thirteenth Amendment to the United States Constitution, which abolished slavery, and did not ratify the amendment until 1901.⁴¹

Federal involvement with slavery in Mississippi did not end with the United States Constitution. Article VI of the Ordinance establishing the Northwest Territory in 1787 states "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes."⁴² Eleven years later, in 1798, Congress established the Mississippi Territory authorizing the establishment of "a government in all respects similar to that now exercised in the territory northwest of the river Ohio, *excepting and excluding the last article*

³⁵ *Id.* art. IV, § 2, cl. 3; see Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 *FORDHAM L. REV.* 1739, 1740 n.12 (1997).

³⁶ U.S. CONST. amends. II & V.

³⁷ See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 *CORNELL L. REV.* 1, 29 n.131 (1990).

³⁸ *Id.* at 29.

³⁹ *Id.* at 29 n.129.

⁴⁰ *Id.*

⁴¹ See generally THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861* (1974).

⁴² Northwest Ordinance of 1787, art. VI, reprinted in U.S.C.A. CONST., ORGANIC LAWS 18 (West 1987).

of the ordinance,"⁴³ i.e., Article VI. The Mississippi Territorial Act, however did state:

From and after the establishment of the aforesaid government, it shall not be lawful for any person or persons to import or bring into the said Mississippi Territory, from any port or place, without the limits of the United States, or to cause or procure to be so imported or brought, or knowingly to aid or assist in so importing or bringing any slave or slaves, and every person so offending, and being thereof convicted before any court within the said territory, having competent jurisdiction, shall forfeit and pay, for each and every slave so imported or brought, the sum of three hundred dollars; one moiety for the use of the United States, and the other moiety for the use of any person or persons who shall sue for the same; and that every slave, so imported or brought, shall thereupon become entitled to, and receive his or her freedom.⁴⁴

The above quoted language banning the importation of slaves from beyond the United States should not be granted an amiable interpretation. Virginia and South Carolina, two of the older, more venerable slave states whose leaders still dominated the national government saw in the Mississippi Territory a ready market for commerce in human lives at a time when many of their own plantations and farms were beginning to fail. From the beginning, the new state would be a major destination point for human cargo "sold down the river" from the border states. Of course, anti-slave solons could easily support such restrictive language, since it prohibited the establishment of new markets for *foreign* slave traders. Such is the art of legislative compromise, and so conceived was the State of Mississippi.

⁴³ Act of April 7, 1798, ch. 28, § 3, 1 Stat. 549, 550 (authorizing the establishment of Mississippi Territory).

⁴⁴ *Id.* § 7, 1 Stat. at 550.

THE MISSISSIPPI CONSTITUTIONS: FEAR AND OPPRESSION

The State of Mississippi was formally organized under the Constitution of 1817.⁴⁵ This document evidences the intent of her founders, who were recent immigrants from the North and South, to fully implement the federally-granted license to establish a wealth-producing slavocracy. Slavery in Mississippi, previously a custom of habit or tradition, would now be buoyed by the force of law and unencumbered by religious scruples or widespread democracy. Some have described this Constitution as "the least democratic of . . . any state admitted after the War of 1812."⁴⁶ From the beginning, state law was dedicated to creating wealth, and wealth was tied to slavery.

Section 1, article I of the state's first constitution granted rights of liberty and freedom to "all freemen," thereby delineating a formal caste system.⁴⁷ Service in the Legislature was limited to "free, white male[s],"⁴⁸ and the governor was required to own at least six hundred acres of land or real estate valuing at least \$2000.⁴⁹ Nascent fears of slave rebellion are evidenced by providing a state militia "to suppress insurrections, and repel invasions."⁵⁰ A determination to absolutely separate church and state is evidenced by the provision that "no minister of the gospel or priest of any denomination whatever, shall be eligible to the office of Governor, Lieutenant-Governor, or to a seat in either branch of the General Assembly."⁵¹

A separate un-numbered article dealt specifically with slaves.⁵² The General Assembly was prohibited from emancipating slaves without consent of the owner.⁵³ The Constitution of 1817 also forbade the General Assembly from prohibiting

⁴⁵ MISS. CONST. of 1817, pmbl.

⁴⁶ LOEWEN & SALLIS, *supra* note 6, at 82.

⁴⁷ MISS. CONST. of 1817, art. I, § 1.

⁴⁸ *Id.* art. III, § 1.

⁴⁹ *Id.* art. IV, § 3.

⁵⁰ *Id.*, Militia, § 4.

⁵¹ *Id.* art. VI, § 7.

⁵² *See id.*, Slaves.

⁵³ *Id.* § 1.

any "immigrant" from bringing slaves into the state, though the General Assembly was granted the right to pass laws to prohibit slaves from being brought to the state as merchandise.⁵⁴ Finally, the Constitution of 1817 found the right to a grand jury unnecessary in prosecuting slaves for crimes, though accused slaves were guaranteed a trial by jury in capital cases.⁵⁵

Article V of the Constitution of 1817 established a judiciary consisting of "not less than four nor more than eight" superior court justices to hear civil and criminal cases.⁵⁶ Any three of these superior court justices, other than the judge who heard the original case, could sit as the appellate supreme court.⁵⁷ All justices were appointed by the Legislature.⁵⁸

The Constitution of 1817 was short-lived as events during the next fifteen years created increasing demands for greater representation among the people. The state land mass more than tripled in size from 1817 to 1832 with the addition of the Choctaw lands in 1830 under the Treaty of Dancing Rabbit Creek and the acquisition of the Chickasaw lands in 1832 under the Treaty of Pontotoc.⁵⁹ These lands were secured through the active involvement of President Andrew Jackson, under whom the Chickasaws had served loyally during the War of 1812.⁶⁰ Jackson's populist politics and the massive influx of new settlers pouring into the former Indian lands contributed to the popular demand for a new constitution. Mississippi, like other southern states, was also shaken by news of the 1831 rebellion of Nat Turner in Virginia. These events culminated in the adoption of a new, much more democratic constitution in 1832. This constitution was also limited to "all freemen" but

⁵⁴ *Id.*

⁵⁵ *Id.* § 2.

⁵⁶ *Id.* art. V, § 2.

⁵⁷ *Id.*

⁵⁸ *Id.* art. IV, § 17.

⁵⁹ JOHN RAY SKATES, JR., A HISTORY OF THE MISSISSIPPI SUPREME COURT 1817-1948, at 11 (1973).

⁶⁰ Jackson and General Thomas Hinds served as Federal Indian Commissioners in 1819. Jackson, who was elected President in 1828, was wildly popular in Mississippi, the state capital being named after him. Hinds County was named in honor of General Hinds.

did not bar clerics from holding office.⁶¹ The same provisions for a militia to suppress insurrection were included.⁶²

Section 2 of the Slave article in the Constitution of 1832 banned

[t]he introduction of slaves into this state as merchandize, or for sale . . . after the first day of May, eighteen hundred and thirty-three: *Provided*, That the actual settler, or settlers, shall not be prohibited from purchasing slaves in any state in this Union, and bringing them into this state for their own individual use, until the year eighteen hundred and forty-five.⁶³

This provision evidenced early recognition by the state's white leaders that they were fast becoming a minority race in Mississippi. In fact, the slave population reached 52% in 1840.⁶⁴ This language also indicates that the large slaveholding class had acquired sufficient labor to maintain their plantation society without the need for additional importation of bondsmen. Foreign competition in the sale of humans could thus be discouraged, sheltering their own profitable in-state slave sales.

The Constitution of 1832 provided for an elected judiciary to serve six-year terms.⁶⁵ The "High Court of Errors and Appeals," as the supreme court was renamed, consisted of three elected justices "any two of whom shall form a quorum."⁶⁶ This scheme of an elected judiciary would remain in place until Reconstruction.

THE CODE: WHERE THE PLOW POINT BUSTS THE SOD

Federal law, local custom and the first two state constitutions planted the seeds of forced human bondage in Mississippi. Legislative enactments ensured that the harvest would be rich. The operative state laws affecting slaves in Mississippi were compiled in Hutchinson's Code of Mississippi and published in

⁶¹ MISS. CONST. of 1832, art. I, § 1.

⁶² *Id.*, Militia, § 3.

⁶³ *Id.*, Slaves, § 2.

⁶⁴ MCCARDELL, *supra* note 18, at 340.

⁶⁵ MISS. CONST. of 1832, art. IV, § 2.

⁶⁶ *Id.*

1848.⁶⁷ This code re-compiled various scattered "acts for the regulation of African Service in Mississippi from 1799 to 1819"⁶⁸ and brought forward large portions of the first state code, known as "Poindexter's Code" after George Poindexter, an early governor of the state.⁶⁹

Slaves were defined in the code as anyone lawfully held for "service for life" and the "descendants of the females of them."⁷⁰ Mulattoes were defined as all persons "who shall have one-fourth or more of negro blood" even though "all her other progenitors . . . shall have been white persons."⁷¹ Color was a dangerous badge of individuality in antebellum Mississippi. Any free "negro" or mulatto who may have emigrated to the state could, after thirty days warning, be sold "to the highest bidder for the term of twelve months."⁷² All free Negroes and mulattoes who lawfully resided in the state because of written emancipation were required to register and be numbered in the Orphan's Court.⁷³ If the free Negro or mulatto should be unable to procure or produce a certificate of freedom, he or she was subject to being sold at public auction with the proceeds, after payment of the jailer's fees and expenses, thoughtfully dedicated "for the use of the poor."⁷⁴

Slave travel and commerce were highly restricted. Slaves were subject to twenty lashes "well laid on" if found away from home "without a pass or some letter or token."⁷⁵ The purchase by the slave of "any article or articles whatever," absent written permission of the master, subjected the slave to thirty-nine lashes.⁷⁶ A slave found offering anything for sale without writ-

⁶⁷ See CODE MISS. 1798 TO 1848 (A. Hutchinson comp. 1848).

⁶⁸ *Id.*

⁶⁹ *Id.* George Poindexter, from Virginia, was the son of a Baptist minister. Poindexter served as a territorial judge in the Mississippi territory in addition to other offices. See generally J.F.H. CLAIBORNE, MISSISSIPPI AS A PROVINCE, TERRITORY AND STATE (1880). His code became known as "the bloody code" because of the severe punishments to be applied for even minor offenses. See *id.*

⁷⁰ CODE MISS. 1798 TO 1848, ch. 37, art. 2, § 1.

⁷¹ *Id.* ch. 37, art. 2, § 15.

⁷² *Id.* § 80.

⁷³ *Id.* § 81.

⁷⁴ *Id.* § 85.

⁷⁵ *Id.* § 8.

⁷⁶ *Id.* § 9.

ten permission of his or her owner was subject to ten lashes.⁷⁷ Any free Negro or mulatto offering liquor to a slave was subject to thirty-nine lashes,⁷⁸ as was any Negro or mulatto, free or slave, who was found using abusive language or lifting his hand in opposition to any person who was not a Negro or mulatto.⁷⁹ Slaves could not own horses, cattle, sheep or hogs, nor cultivate cotton for their own use.⁸⁰ Slaves were themselves declared to be personal property.⁸¹ Any African-American or mulatto, whether free or slave, could testify in court only against other persons of color.⁸²

A slave was subject to the death penalty for assaulting a white person,⁸³ or maiming or raping "any free white woman" or for "burning any dwelling-house, store, cotton-house, gin or out-house, barn or stable."⁸⁴ For the commission of other non-capital felonies, the slave was punished by being "burnt in the hand."⁸⁵ Ironically, the code provides that *cruel punishments* were not to be inflicted on slaves by their masters.⁸⁶

The code prohibited "any slave, free negro, or mulatto, to exercise the function of a minister of the Gospel."⁸⁷ The penalty was thirty-nine lashes.⁸⁸ A master, however, could "permit his slave to preach upon his own premises, but [could] not permit any other slaves but his own to assemble there."⁸⁹

The slave code burdened persons in bondage, granting them no rights but exposing them to severe penalties. However, slaves could file suit in circuit court to establish freedom.⁹⁰ This provision was used frequently, and when such actions

⁷⁷ *Id.* § 28.

⁷⁸ *Id.* § 31.

⁷⁹ *Id.* § 32. However, if any "such Negro or mulatto was wantonly assaulted," he or she could defend himself or herself. *Id.*

⁸⁰ *Id.* §§ 41-42.

⁸¹ *Id.* § 45.

⁸² *Id.* § 21.

⁸³ *Id.* § 52.

⁸⁴ *Id.* § 55.

⁸⁵ *Id.* § 54.

⁸⁶ *Id.* § 44.

⁸⁷ *Id.* art. 10, § 6.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* art. 2, § 76.

were filed, slaves received remarkably fair hearings as will be discussed below.

The code stripped slaves and, for all practical purposes, free people of color, of all meaningful individual rights. The state's efforts to subdue people of color and the widespread fear of insurrection also had negative effects on the individual rights of whites. Any free person advising slaves to rebellion "shall suffer death."⁹¹ A white person found at any "unlawful" meeting with "slaves, free negros or mulattoes" could be fined twenty dollars "to the use of the informer" and receive a whipping "not exceeding twenty lashes."⁹² Free whites were subject to being drafted at any time for "patrol" duty to guard against insurrections and rebellions and to hunt runaway slaves.⁹³ The fear of slave insurrection even dictated the location of housing. No owner could house more than six slaves "greater than one mile from the residence of such person, unless such person shall keep and employ with such slaves, as an overseer, a white male person capable of performing patrol duty."⁹⁴ Owners of slaves who resided in town were required to house their slaves in a lot "immediately connected with the lot upon which is the usual dwelling house and residence of such person."⁹⁵

The value of slaves in antebellum society is forcefully evidenced by the statute providing for payment to the owner of "one half of the value of any slave . . . condemned to die" to be paid "out of the State Treasury."⁹⁶ The potential burden on the state treasury, and the owner's obvious interest in protecting their wealth, most likely contributed to the oft-noted dedication of antebellum state court judges to ensure some semblance of fair trials for slaves in capital cases. This act, which on first blush would appear to favor only the owner's interest, proved critically beneficial in providing some semblance of due process

⁹¹ *Id.* § 51.

⁹² *Id.* § 19.

⁹³ *Id.* art. 4, § 1.

⁹⁴ *Id.* art. 17, § 7.

⁹⁵ *Id.* § 8.

⁹⁶ *Id.* art. 20, § 1. This Act was not a dead-letter. See Act for the Relief of Aaron P. Cunningham, ch. 40, 1856 Miss. Laws 119.

to slaves in criminal cases. Adam Smith's invisible hand of commerce transposed self-interest into remarkably liberal applications of due process in slave cases. An owner had an incentive not to take the law into his own hands. If his slave was unlawfully hanged or lynched, the owner got nothing.⁹⁷ On the other hand, if the hanging occurred as the result of lawful process, the owner received at least one-half the value of the slave.⁹⁸ Usually, the owner's investment in slaves was his greatest source of capital. Consequently, the master was not only encouraged to refrain from unnecessary violence himself; he had a strong incentive to protect his slaves from the violence of others as well. On the other hand, the state had an interest in protecting its budget. Too many lawful executions would prove a drain on the limited state budget. Since judges were elected after 1832, and thereby had to answer to the people, the one-half value provision undoubtedly encouraged courts to note the economic consequences of their rulings in capital cases. As will be noted below, slaves benefitted from this accidental judicial accountability by receiving remarkably fair rulings from the bench in capital cases.

The act was amended in 1848 to prohibit payment of the one-half value provision to non-residents of the state.⁹⁹ This exhibited evidence of the emerging siege mentality of in-state whites. This amendment undoubtedly provided an inducement for slave owners to live in-state and thereby augment the white percentage of the state population. Literature on the subject indicates persuasively that slaves were more likely to be abused on absentee owner plantations as opposed to those plantations where the owner and his family resided near the slaves. The effect of this provision, which addressed white safety issues by encouraging the in-state presence of slave owners, ultimately inured to the benefit of slaves who typically fared better under on-site owners.

The antebellum Mississippi lawmakers may be fairly criticized for the severity of the slave code. However, democratically

⁹⁷ CODE MISS. 1798 TO 1848, ch. 37, art. 20, § 1.

⁹⁸ *Id.*

⁹⁹ *See id.* art. 24.

elected legislators, regardless of color or creed, rarely rise beyond the perceived present interests of their constituents. In antebellum Mississippi, elections were limited to free white males who were obsessed with creating quick wealth based on forced labor. The issues had become black and white and green. Legislative enactments merely reflected the prevailing public opinion of the times.

Violent punishments were not limited to slaves or slave-related offenses. Whites were also subject to violent punishments under the early code. A fellow caught stealing a hog or a goat would get "thirty-nine lashes well-laid on."¹⁰⁰ A white person convicted of selling a free person as a slave "shall suffer death."¹⁰¹ Altering or defacing brands on livestock subjected the miscreant to "any number of lashes not exceeding thirty, or stand in the pillory not exceeding two hours."¹⁰² And so on. Crimes against property were taken very seriously in early Mississippi. Of course, we should not be too quick to criticize the early legislators for being too out-of-step with their times. History absent perspective is little more than opinion. Lashes and pillories were not limited to antebellum Mississippi. A man found sleeping with his brother's wife in New Hampshire could get "thirty stripes."¹⁰³ Delaware authorized whipping as late as 1952.¹⁰⁴

Harsh statutes, however, are more often ignored than applied. Many accounts of slaveholder brutality do exist in the literature of Mississippi. However, as Hamlet says, it is likely these provisions were more honored in the breach than the observance. Many accounts of amicability between whites and blacks can also be found in writings of the period. The cases examined later in this article establish that economics played a greater role than criminal statutes in master-slave relations. Slaves held great economic value. A slave scarred or maimed

¹⁰⁰ *Id.* ch. 64, art. 1, § 26.

¹⁰¹ *Id.* § 17.

¹⁰² *Id.* § 33.

¹⁰³ An Act for the Punishment of Lewdness, Adultery and Polygamy, 1791 N.H. Laws 257.

¹⁰⁴ See Daniel E. Hall, *When Caning Meets the Eighteenth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 426 (1995).

had a much lower resale value than a healthy slave—much as a dented fender reduces the value of the family clunker when we seek to trade cars today. Neither the law nor sympathy were as likely as the market to induce some measure of civility and freedom from corporal punishment in slave society.¹⁰⁵

The early session laws of Mississippi also exhibit scattered acts giving relief to those who voluntarily requested that the Legislature select a master to whom they would be enslaved for life.¹⁰⁶ Charles Sydnor writes of a deserted, mentally retarded slave named Mary Ann who was cared for by a stranger, John Thompson of Monroe County, Mississippi, who was allowed \$10 a month from the county for his charity.¹⁰⁷ The number of petitions for slavery granted by the Legislature indicate that for some Africans of the Nineteenth Century, slavery was preferable to trying to live among the vicissitudes and lack of opportunity in the outside white world. In such cases, slavery was evolving into a bizarre form of private welfare assistance in Mississippi by 1861.

Though committed to violent regulation of slaves in-state, the Legislature was quick to defend slavery when provoked by actions of other states or the federal government. As early as 1826, the Mississippi House of Representatives responded to resolutions from New Jersey, Connecticut, Delaware, Indiana and Illinois, proposing the abolition of slavery as follows:

That, under the Constitution and Laws of our Country, the right of property in Slaves is as sacred and inviolate as that of any other species of personal property whatever. However great may be the national evil of slavery, and however much we may regret it: circumstances over which we could have no control, have rendered it inevitable, and places it without the pale of legislative authority. We, therefore, cannot concur in any arrangement for their emancipation, by any legislative enactment, without violating the constitutional rights of our citizens. Any interference in our own internal concerns upon subjects of this kind, is only calculated to en-

¹⁰⁵ See SYDNOR, *supra* note 8, at 86-101.

¹⁰⁶ See, e.g., Act of Feb. 11, 1860, ch. 300, 1860 Miss. Laws 352; Act of Jan. 20, 1860, ch. 202, 1860 Miss. Laws 259.

¹⁰⁷ See SYDNOR, *supra* note 8, at 250.

gender feelings of prejudice; which, if fostered by the continued efforts of the Non-Slave holding States, in persevering in their efforts, may, eventually, produce consequences deplorable to society; and tend to weaken that bond of union and fellowship, which should exist between all the members of the same confederacy. . . . [B]y holding out the semblance of aid and prospect of freedom, they might be easily stimulated to rebellion; and our citizens might fall victims to a policy, against the exercise of which, *they* protest; and in which policy they are determined not to participate.¹⁰⁸

In 1854, the Legislature praised President Franklin Pierce for appointing Jefferson Davis to his cabinet and proclaimed:

That the policy of the President, as exhibited in his message and Executive appointments, in discountenancing all further slavery agitation, in and out of Congress, meets our hearty approbation, both on account of its consonance to his known antecedents and pledges before his election, and because we believe that the discussion of the exciting questions connected therewith, is eminently dangerous to the institution itself, and destructive of the best interest of the country.¹⁰⁹

By 1860, the Legislature, protesting the possible election of a Republican as President of the United States, resolved:

1. *Resolved, by the Legislature of the State of Mississippi*, That the Constitution of the United States recognises [sic] property in slaves, and the government created by it cannot, nor can any tribunal acting under its authority, whether it be executive, legislative or judicial, within its appropriate sphere, justly withhold from the owners of slaves that adequate protection for their slave property to which the owners of property of other kinds are entitled, or which from its nature they may further require to secure them in its possession and enjoyment.

2. That the election of a President of the United States by the votes of one section of the Union only, on the ground that there exists an irreconcilable conflict between the two

¹⁰⁸ A Report and Resolution to the Gradual Emancipation of People of Color Held in Servitude in the United States, ch. 85, 1826 Miss. Laws 125.

¹⁰⁹ Act of Feb. 4, 1854, ch. 381, 1854 Miss. Laws 584, 585.

sections in reference to their respective systems of labor, and with an avowed purpose of hostility to the institution of slavery [sic] as it prevails in the Southern States, and as recognized by the compact of Union, would so threaten a destruction of the ends for which the Constitution was formed, as to justify the slave-holding States in taking counsel together for their separate protection and safety.¹¹⁰

This resolution was passed in February of 1860, months before Abraham Lincoln was even nominated by the Republicans for president.

From beginning to end, the Mississippi Legislature defended and sought to regulate every aspect of slavery in Mississippi. The legislators were nothing more, nor less, than men of their times. As times tolled by, an unenlightened grasp for profits, rather than a polestar dedication to freedom and an inherent respect for human life, only produced inner and outer darkness. The solons, fearing ultimate insurrection, did periodically attempt to close the door to further slave importation into the state, but as will be seen below, this effort was finally blocked by the United States Supreme Court and the voice of Mississippi's own people.

THE MISSISSIPPI SUPREME COURT AND RACE: FROM AMITY TO ALIENATION

The Constitution of 1817 provided for appointed supreme court justices sitting in panels of three.¹¹¹ This framework was redesigned by the Constitution of 1832 which provided for a newly-named High Court of Errors and Appeals consisting of three elected justices.¹¹² The membership of the high court frequently shifted from 1817 to 1861, and the court's interpretation of constitutional provisions and statutes shifted, depending on the membership of the court. The pronouncements of the early appellate court, as it struggled with slavery issues, not only provides an insight into the evolution of the law, but also sparks an interest in the personalities of the justices in-

¹¹⁰ Resolutions on Federal Relations, ch. 397, 1860 Miss. Laws 566.

¹¹¹ SKATES, *supra* note 59, at 3.

¹¹² *Id.* at 12-13.

volved. Institutions are often flawed, and some institutions, such as slavery, are evil in essence. However, the hearts and minds of individuals sometimes rise above the commonplace and, if only for a brief moment, evidence the highest and best in human nature. Biographical commentary will be offered below to shed light on then-existing tensions, not only within the state, but within the high court itself, as individual justices grappled with the impossible task of fairly applying law and logic to the peculiar institution of slavery. They were charged with executing, in some semblance of good faith, a justice system founded on state constitutions and statutes tragically out of step with emerging (though sometimes dormant) civilized notions of the natural rights of all people to live freely.

Arguably, appointed justices are more removed from public passions than their elected brethren. The first decisions of the appointed judiciary do reflect a refreshingly independent dedication to justice and equality. A complete review of all reported decisions, however, indicates that Mississippi high court justices, whether elected or appointed, usually acted independently of populist politics until the dawn of war. However, as the slave population steadily increased, and quickly surpassed the white population in the 1830s, free whites in Mississippi ultimately developed a siege mentality.¹¹³ The courts were not immune from this ethos. The justices initially proclaimed liberty as their primary consideration. Their noble hopes would not last. Like the executive and legislative branches, the judiciary, too, would finally deny any meaningful freedom to people of color and angrily claim a state's right to defend slavery on the grounds of public safety.

National events also affected the judiciary in Mississippi and undoubtedly tempered inclinations of individual justices. The effect of the United States Supreme Court decision of *Dred*

¹¹³ An excellent account of white hysteria in the 1830s is found in the tragic, but comedic account of the great privy shoot-out between the citizens of Madison and Hinds counties in 1835. See WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854*, at 100-13 (1990); see also BRADLEY G. BOND, *POLITICAL CULTURE IN THE NINETEENTH-CENTURY SOUTH: MISSISSIPPI 1830-1900*, at 92-93 (1995).

Scott v. Sanford,¹¹⁴ cannot be overstated in its contribution to the hardening of resolve in Mississippi to protect and continue the peculiar institution in the 1850s. In addition to being bad law, the *Dred Scott* decision granted its imprimatur to a strident coarsening of language when referring to people of color not previously found in Mississippi cases.

The period from 1817 to the mid-1850s, pre-*Dred Scott*, shows a Mississippi high court struggling to bring some measure of civility and humanity to the institution of slavery. From the mid-1850s onward, published opinions reflect a stiffening resolve to protect the institution of slavery, whatever the costs. Drama is found in the not rare statements of kindness and concern for a people in bondage and the acts of courage, in spite of politics, as individual justices struggled to fashion some sort of justice within a culture founded upon a system opposed to all notions of freedom and equality.

"in favorem vitae et liberatitit"

The high point of antebellum Mississippi judicial sentiments supporting universal freedom and human compassion was clothed in the robe of one Joshua G. Clarke, a justice on the Mississippi Supreme Court from 1818 to 1821.¹¹⁵ He resigned from the supreme court in 1821 to become the state's first chancellor.¹¹⁶ The maxims of equity undoubtedly suited his nature. Clarke was a native of Pennsylvania and served in the territorial legislature representing Claiborne County prior to the state's admission to the Union.¹¹⁷ He was also a delegate to the 1817 state constitutional convention.¹¹⁸ Only one reported opinion is attributed to Clarke in the early Mississippi reporters: *State v. Jones*,¹¹⁹ wherein the defendant, apparently a white man, had murdered a slave.¹²⁰ The issue to be decided was whether the murder of a slave in Mississippi was a

¹¹⁴ 60 U.S. (19 How.) 393 (1857).

¹¹⁵ SKATES, *supra* note 59, at 69.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 1 Miss. (1 Walker) 83 (1821).

¹²⁰ *Jones*, 1 Miss. at 83.

crime.¹²¹ Until *Jones*, this issue was undecided. Clarke discussed ancient Roman law and English common law and even referred to the northern barbarians who overran Europe in finding that in Mississippi, though "individuals may have been deprived of many of their rights by society, it does not follow, that they have been deprived of all their rights."¹²² Clarke stated:

[I]t would be a stigma upon the character of the state, and a reproach to the administration of justice, if the life of a slave could be taken with impunity, or if he could be murdered in cold blood, without subjecting the offender to the highest penalty known to the criminal jurisprudence of the country.¹²³

Clarke asked:

Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase *reasonable creature* is a human being, for the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher . . . ?

. . . .

When the northern barbarians overran Southern Europe, they had no laws but those of conquerors, and conquered, victors, and captives, yet even by this savage people, no distinction was recognized between the killing in cold blood, a slave or a freeman. And shall this court, in the nineteenth century, establish a principle, too sanguinary for the code even of the Goths and Vandals, and extend to the whole community, the right to murder slaves with impunity?¹²⁴

The court found *Jones* liable for the murder of the slave and sentenced him to be hanged.¹²⁵

Jones, though written in 1821, indicates that this state's most striking early opinion on slave rights, *Harry v. Deck-*

¹²¹ *Id.* at 83-84.

¹²² *Id.*

¹²³ *Id.* at 84.

¹²⁴ *Id.* at 85-86 (emphasis added).

¹²⁵ *Id.* at 86.

er,¹²⁶ rendered anonymously by the Mississippi Supreme Court in 1818, could only have been penned by Justice Clarke.

Decker is remarkable not only for its eloquence but for the important finding that comity, or respect for the law of other states, would be applied in 1818 in Mississippi, even when application of such a judicial principle meant loss of wealth to the Mississippi master and freedom for the slave.¹²⁷ The decision's lofty style, based on ancient principles of human rights, is remarkably similar to the fair-minded prose found in *Jones*. Clarke's authorship is further indicated by the logical exclusion of other likely writers. The original Mississippi Supreme Court consisted of three appointed justices: Clarke, Powhatan Ellis from Virginia and William B. Shields from Delaware.¹²⁸ Shields resigned in April of 1818, to be replaced by John P. Hampton from South Carolina.¹²⁹ Since the *Decker* opinion was handed down in June of 1818, it is unlikely that Hampton participated and Shields may have already left the court. Extant biographies of the early justices give Justice Clarke favorable reviews for his clarity and style but refer to Justice Ellis, who was also educated in Pennsylvania, as "extremely indolent."¹³⁰ None of the published opinions by Ellis, Shields or Hampton match the solicitous tone or grasp of ancient history evidenced by Clarke in *Jones* and mirrored in *Decker*.

In *Decker*, the issue was whether slaves who had been taken into the limits of the Northwest Territory became freedmen by having lived in the territory under the Ordinance of 1787 which declared "there shall be neither slavery nor involuntary servitude in said territory otherwise than for the punishment of crimes, whereof the party shall be duly convicted."¹³¹ The author of *Decker* discussed the history of the Indiana territories from prior to the Revolutionary War until Indi-

¹²⁶ 1 Miss. (1 Walker) 36 (1818).

¹²⁷ *Decker*, 1 Miss. at 37-43.

¹²⁸ See SKATES, *supra* note 59, at 5.

¹²⁹ *Id.*

¹³⁰ *Id.* at 74.

¹³¹ *Decker*, 1 Miss. at 46 (quoting Northwest Ordinance of 1787, art. VI, reprinted in U.S.C.A. CONST., ORGANIC LAWS 18 (West 1987)).

ana entered statehood, quoted Rousseau and his social compact theory and generally evidenced a sophisticated, sensitive appreciation of natural rights and the eminent dangers of state-ordained slavery.¹³² After much discussion of the Indiana and Virginia constitutions and the various compacts and ordinances previously applicable to the Northwest Territory, the Mississippi Supreme Court finally stated as follows:

Slavery is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule, that courts must lean "in favorem vitae et libertatis." Admitting it was a doubtful point, whether the constitution was to be considered prospective in its operation or not, the defendants say, you take from us a vested right arising from municipal law. The petitioners say you would deprive us of a natural right guaranteed by the ordinance and constitution. How should the Court decide, if construction was really to determine it? *I presume it would be in favor of liberty.*¹³³

The court granted the slaves freedom.¹³⁴

The issues in *Decker* were identical to those later addressed in *Dred Scott* by the United States Supreme Court, which reached the opposite conclusion by deciding against freedom in striking down a congressional act banning slavery north of the 36° 30' line in the Missouri Compromise.¹³⁵

The altruistic view of human rights in Mississippi and respect for the laws of other jurisdictions enounced in *Decker* was not to last. Several events, touched upon above, affected the Mississippi judiciary in the late 1820s and the 1830s. The most direct effect on the judiciary, as a result of the adoption of the populist Constitution of 1832, was its reorganization in 1833 from an appointed supreme court to the elected High Court of Errors and Appeals.¹³⁶ The Chief Justice of this new court was William L. Sharkey of Warren County, who served

¹³² *Id.* at 36-42.

¹³³ *Id.* at 42-43 (emphasis added).

¹³⁴ *Id.* at 43.

¹³⁵ See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

¹³⁶ SKATES, *supra* note 59, at 12-14.

from 1833 to 1851.¹³⁷ He was joined on the court by Cotesworth Pinkney Smith, a South Carolinian who moved to Wilkinson County and who served intermittently from 1833 to 1863, and Daniel W. Wright, a Tennessean from Monroe County, who served from 1833 to 1838.¹³⁸ Of the three, Sharkey would have the greatest impact on the laws of the state and was one of the preeminent Mississippians of the Nineteenth Century. Sharkey was the son of an Irish Dubliner.¹³⁹ He was born in Tennessee in 1797 and came to Mississippi in 1803.¹⁴⁰ He served under Andrew Jackson in the Battle of New Orleans, was largely self-taught in the law and was elected to the Mississippi Legislature in 1827.¹⁴¹ Though he opposed an elected judiciary, he ran for the office and was elected to the new court in 1833.¹⁴² Politically, Sharkey was a Whig, in a Democratic state, and a staunch Unionist, in a secessionist environment.¹⁴³ He later refused to participate in the state or confederate governments during the Civil War and served as provisional governor of the state in 1865.¹⁴⁴ His opinions, however, reflect a realistic judicial temperament, untroubled by high notions of universal rights.

Chief Justice Sharkey severely limited *Decker* in the 1838 case of *Hinds v. Brazealle*.¹⁴⁵ Elisha Brazealle left Mississippi in 1826 and traveled to Ohio, a free state, with a "negro" woman and her son, John Munroe Brazealle.¹⁴⁶ Elisha emancipated both slaves in Ohio, then returned with them to his home in Jefferson County, Mississippi, where he lived until his death.¹⁴⁷ In his will Elisha acknowledged their emancipation and devised his property to his former slave, John Munroe

¹³⁷ *Id.* at 15.

¹³⁸ *Id.* at 94.

¹³⁹ *Id.* at 88.

¹⁴⁰ *Id.* at 88-89.

¹⁴¹ *Id.* at 13.

¹⁴² *Id.*

¹⁴³ *See id.* at 2.

¹⁴⁴ JAMES D. LYNCH, *THE BENCH AND BAR OF MISSISSIPPI* 189-202 (1881).

¹⁴⁵ 3 Miss. (2 Howard) 837 (1838).

¹⁴⁶ *Brazealle*, 3 Miss. at 841.

¹⁴⁷ *Id.*

Brazealle, acknowledging John to be his son.¹⁴⁸ The will was challenged by Elisha's other natural heirs who claimed that John Munroe Brazealle was still a slave and, therefore, could not take under the will according to state law.¹⁴⁹ Chief Justice Sharkey recognized that "upon principles of national comity, contracts are to be construed according to the laws of the country or state where they are made."¹⁵⁰ John had been freed under Ohio law.¹⁵¹ *Decker* would appear to have been controlling. However, Sharkey found slavery to be such an ingrained part of the law of Mississippi that questions of freedom versus bondage must be settled in favor of bondage, foreign laws and *Decker* notwithstanding. Sharkey succinctly stated the policy of Mississippi as follows:

The policy of a state is indicated by the general course of legislation on a given subject, and we find that free negroes are deemed offensive, because they are not permitted to emigrate to, or remain in the state. They are allowed few privileges, and subject to heavy penalties for offences [sic]. . . . No owner can emancipate his slave, but by a deed or will properly attested, or acknowledged in court, and proof to the legislature, that such slave has performed some meritorious act for the benefit of the master, or some distinguished service for the state; and the deed or will can have no validity until ratified by special act of the legislature. It is believed that this law and policy are too essentially important to the interests of our citizens, to permit them to be evaded.¹⁵²

Sharkey concluded that "the consequence is, that the negroes John Munroe and his mother, are still slaves, and a part of the estate of Elisha Brazealle."¹⁵³

Sharkey's holding, while inconsistent with *Decker*, was not out of step with Mississippi law in the late 1830s. Paranoia about free blacks in the state was growing in the 1830s as the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 841-42.

¹⁵⁰ *Id.* at 842.

¹⁵¹ *Id.*

¹⁵² *Id.* at 842-43.

¹⁵³ *Id.* at 843.

slave population increased. Both the 1817 Constitution and the 1832 Constitution prohibited the Legislature from passing laws for the emancipation of slaves, absent consent of the owners. State law prohibited emancipation of slaves by last will and testament or manumission, absent legislative approval. The 1832 Constitution prohibited the importation of slaves into the state as merchandise for sale after May 1, 1833, but allowed actual settlers to bring slaves into the state until 1845. The Legislature passed an act on May 13, 1837, prohibiting the importation of slaves into the state for sale. Sharkey's opinion not only represented political fears of the state leadership in 1838, it also reflected judicial deference to state statutory law over Clarke's appeal to "natural rights."

Sharkey's *Brazealle* opinion was soon to be overruled in the related cases of *Ross v. Vertner*¹⁵⁴ and *Wade v. American Colonization Society*.¹⁵⁵ These opinions were written by Justices James Fisher Trotter and Alexander M. Clayton, respectively.¹⁵⁶ Trotter, a native of Virginia, began his Mississippi law practice in Monroe County, Mississippi, and served terms in both the Mississippi House and Senate.¹⁵⁷ He was a delegate to the Constitutional Convention of 1832 where, like Sharkey, he opposed the election of justices.¹⁵⁸ He was appointed to a vacancy on the court in 1838 and elected to a full term in 1839.¹⁵⁹ Alexander M. Clayton, who followed Trotter to the bench after Trotter resigned in 1842, was also born in Virginia and settled in Marshall County to practice law.¹⁶⁰ Clayton was an ardent states righter, a secessionist and a slaveholder.¹⁶¹ Nevertheless, his judicial opinions, like Trotter's, reflect a special sensitivity for the condition of slaves. These two justices in the 1840s sometimes approached Justice Clarke's earlier broad-mindedness.

¹⁵⁴ 6 Miss. (5 Howard) 305 (1840).

¹⁵⁵ 15 Miss. (7 S. & M.) 663 (1846).

¹⁵⁶ *Vertner*, 6 Miss. at 356; *Am. Colonization Soc'y*, 15 Miss. at 692.

¹⁵⁷ SKATES, *supra* note 59, at 101.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ LYNCH, *supra* note 144, at 504; SKATES, *supra* note 59, at 101.

Vertner has value beyond its statement on the law of comity. This case highlights both the absolute power of the masters to control the ultimate fates of their slaves and the often petulant manner by which masters extended and revoked privileges. Finally, it evidences the extent to which the Mississippi High Court of Errors and Appeals could be creative in reaching a humane result, even in the face of legislative prohibitions. In *Vertner*, Captain Ross directed by his will that as soon as the crops were gathered

all my slaves of the ages of twenty-one years and upwards . . . be called together by my executors, and the provisions of this will then and there explained to them, and the question put to them whether they will go to Africa upon the terms hereinafter specified. If a majority of the whole number thus called together of the ages of twenty-one years and upwards shall elect to go to Africa, then it is my will and desire that all of those thus called together . . . shall be sent to Africa, under the directions and superintendance [sic] of the American Colonization Society. . . .

If, however, . . . a majority of the whole number of the ages of twenty-one years and upwards . . . should refuse to go to Africa, then it is my will and desire that all of my slaves . . . shall be exposed to sale, at public auction, at the same time, in the same manner, upon the same terms and subject to the same regulations with the remainder of my estate ¹⁶²

Upon further reflection, Ross periodically added codicils to his will, petulantly withdrawing the right of manumission from certain slaves and granting minor favors to others.¹⁶³ Upon his death, his natural heirs challenged the devise of freedom upon the statutory grounds that the Mississippi Legislature had prohibited by general law the manumission of slaves in the State of Mississippi by will, unless approved by the Legislature.¹⁶⁴ As the contestants argued in their brief:

¹⁶² *Vertner*, 6 Miss. at 306-08 (quoting language from Captain Ross's will).

¹⁶³ *Id.* at 309-12.

¹⁶⁴ *Id.* at 312.

Can pure water thus be drawn from an impure fountain? The germs of freedom, according to such superficial reasoning, have been sown in Mississippi and nurtured by her policy and laws. If the slaves have not been legally emancipated by the last will and testament . . . they constitute property, and not having been devised to the executors in their own right, must descend to the heirs.

. . . .
Slaves constitute a portion of the vested wealth and taxable property of the state. Without them her lands are worthless. Would it not therefore be contrary to the policy of the state, to part with this vested wealth, this source of revenue, with that which alone renders her soil valuable.

. . . So certain as the heavens afford indications of the coming storm, so certain will scenes of blood be the concomitants of such testamentary dispositions in this state. And yet it is said that the colony of Liberia is an object worthy of all philanthropic encouragement. What! that germ whence spring the elements of discord and dissatisfaction among the slaves of the country ¹⁶⁵

The slaves were represented on appeal by the brilliant Whig attorney, S.S. Prentiss, who argued that the requirement that emancipation of slaves by will be approved by the Legislature "was intended by the legislature only to relieve the state from the accumulation within its borders of an obnoxious free black population."¹⁶⁶ Thus, Prentiss argued, the Legislature had no legitimate state interest in what became of the slaves as long as they left the State of Mississippi.

Justice Trotter, writing for the court, stated that it was "quite unimportant that this Court should express an opinion . . . whether the title of the appellants as heirs at law of Isaac Ross their ancestor, to the property he possessed, be derived from the law of nature, or the positive constitutions of the society of which they are members."¹⁶⁷ Justice Trotter cleverly restated the argument to be not "whether the testator had the ability to manumit his slaves without the consent of

¹⁶⁵ *Id.* at 334-36.

¹⁶⁶ *Id.* at 346.

¹⁶⁷ *Id.* at 356-57.

the legislature, but whether he possessed the power to send them to Africa there to remain free."¹⁶⁸ Trotter then found that there was no question as to whether the testator, when living, could have carried his slaves to Africa in his lifetime.¹⁶⁹ He then found that since the testator could have so acted during his lifetime, that it was not the intent of the Legislature to prevent him from doing through his will what he could have done individually during his life.¹⁷⁰ Therefore, since Ross was providing freedom to the slaves outside the boundaries of the State of Mississippi, he was free to manumit them through his last will and testament, despite the statutory prohibition.¹⁷¹ The court ruled that under the rules of national comity, no great principle of state policy was violated by foreign manumission.¹⁷² The court stated specifically as follows:

Placed thus beyond our limits, their freedom could not be the subject of animadversion by the municipal laws of Mississippi, whose rigorous police regulations on this subject, were designed for the security of slave owners in the state, against the dangers of too great an increase of free negroes, whose example and whose means too of sowing the seeds of mischief, of insubordination, perhaps of revolt, amongst the slaves in their neighborhood, was very justly to be apprehended and guarded. It is not the policy of Mississippi to augment her slave population.¹⁷³

The court thus approved manumission of slaves, without legislative approval, when the slaves were to be exported.

Controversy in this case is indicated by the fact that Trotter attached to his opinion, after it was rendered, citation of a consistent South Carolina Court of Appeals case.¹⁷⁴ He justified this addition to the opinion because of

¹⁶⁸ *Id.* at 358-59.

¹⁶⁹ *Id.* at 359.

¹⁷⁰ *Id.* at 359.

¹⁷¹ *Id.* at 360-61.

¹⁷² *Id.*

¹⁷³ *Id.* at 360.

¹⁷⁴ *Id.* at 361-62 (citing *Frazier v. Frazier's Ex'rs*, 11 S.C. Eq. (2 Hill Eq.) 305 (1835)).

[t]he importance of the case to the parties and to the country, the zeal with which the able counsel who argued it, resisted the conclusions of the court, as well as the agitation it has produced in the country, are the reasons which have induced me to adduce this superadded authority to support the judgment of the court.¹⁷⁵

The executors of the Ross estate did not take kindly to Justice Trotter's opinion. The same parties appeared before the high court again in 1846 in *Wade v. American Colonization Society*.¹⁷⁶ In the second hearing of the Ross estate, the high court was faced with the recalcitrant executor's refusal to obey the court's prior mandate.¹⁷⁷ The executors had refused to sell any portion of the estate or deliver the slaves to the American Colonization Society, a charitable organization founded to relocate freed slaves in Africa, because they contended that the trusts created by the will were in violation of the policy of the state and also violated the manumission laws.¹⁷⁸ The chancellor in the lower court had ordered the executors to comply with the dictates of the will.¹⁷⁹ Upon their refusal, the case was appealed.¹⁸⁰ The second opinion was written by Justice Alexander M. Clayton.¹⁸¹ Clayton faced an 1842 act of the Legislature, passed as a result of the prior *Vertner* opinion, which required the removal of free slaves from the state within twelve months after liberation.¹⁸² The act declared their bequest of freedom void if they were not so removed.¹⁸³ In this case, the slaves had not departed within twelve months because the executor refused to comply with the earlier high court opinion.¹⁸⁴ Justice Clayton dealt with this argument by stating that

¹⁷⁵ *Id.* at 362.

¹⁷⁶ *Am. Colonization Soc'y*, 15 Miss. at 692.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 663.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 692.

¹⁸² *Id.* at 698.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

[i]t will be borne in mind that before the passage of this law, the provisions of this will had been declared valid by the judgment of this court, and the slaves declared entitled to an inchoate right of freedom, which would be perfect by their removal from the state. The bill shows the use of every means in the power of the complainants or of those for whom they act, to comply with this law. . . . If the statute have taken away their right to freedom it has been against their best efforts, and those of their trustees. It has been by a breach of trust and perversion of power. Can the end be attained by such means?¹⁸⁵

Clayton voiced disdain for the Legislature's attempt to interfere with its judicial pronouncements and stoutly stated, "[w]e need not determine the validity of the law. It has nothing to do with the case; the fraud of the party has placed him beyond its pale."¹⁸⁶ Equity trumped legislative complicity in the fraud. The court affirmed the order of the chancery court granting freedom to the slaves.¹⁸⁷

Later that year, Justice Clayton again faced the question of slave manumission in *Leech v. Cooley*.¹⁸⁸ In *Leech*, the testator directed his slaves to be set free and sent to either Indiana or Liberia "as they might prefer."¹⁸⁹ The testator also directed that most of his estate be sold and paid to the liberated slaves.¹⁹⁰ He specifically devised one house and one lot to each of his female slaves.¹⁹¹ Referring to *Vertner*, Clayton found:

It is the policy of this state, as evinced by its legislation, to prevent the increase of free persons of color therein. . . . But when they leave the limits of such state, and enter another, they become subject to the laws of the latter, and must be

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ 14 Miss. (6 S. & M.) 93 (1846).

¹⁸⁹ *Leech*, 14 Miss. at 98.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

governed by them. The general government does not interfere with the regulations of the states in this respect.

. . . The right to freedom under the will is inchoate, and becomes complete, when the subjects of it are removed to another state or country, according to its provisions.¹⁹²

The court found the bequest to the slaves not void, but simply stated that "[i]f they do not comply with the terms of the will, the whole bequest is void; if they do, it will be valid."¹⁹³ In other words, the high court found that the slaves should be transported to Indiana or Liberia, under the terms of the will, and once in either of those locations, would be declared free.¹⁹⁴ As free persons, they could then take title to the specific bequests of real property under the will, regardless of legislative prohibitions to the contrary.¹⁹⁵ This high-minded judicial independence in matters of manumission would continue until the dawn of the war.

THE SLAVE AND CRIMINAL LAW

Mere Technicalities

The high court was color-blind when hearing criminal cases and often seized upon any "technicality" to reverse convictions of both slaves and free persons of color. In *Byrd v. State*,¹⁹⁶ the court reversed the conviction of a free person of color for serving as accessory to a slave named Daniel in the murder of his master, Joel Cameron.¹⁹⁷ The indictment charged Byrd with having hired the slave to murder Cameron.¹⁹⁸ On his second appeal by habeas corpus, Chief Justice Sharkey found technical grounds for reversing the conviction.¹⁹⁹ It was learned that

¹⁹² *Id.* at 98-99.

¹⁹³ *Id.* at 99.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ 2 Miss. (1 Howard) 163 (1834).

¹⁹⁷ *Byrd*, 2 Miss. at 182.

¹⁹⁸ *Id.* at 164.

¹⁹⁹ *Id.* at 182.

[o]ne of the jurors, on being asked after he was sworn on his voir dire, declared that he was neither a freeholder or householder, and the counsel for the prisoner challenged him for cause, which was overruled by the court, and a bill of exceptions taken, which brings the question fairly before this court as a defect appearing affirmatively on the record.²⁰⁰

Sharkey found the law clearly required all jurors be freeholders or householders and thus the jury below was improperly drawn and the case was reversed.²⁰¹

In the case of *Peter v. State*,²⁰² Peter, a slave, had been convicted of murder.²⁰³ The court reversed in a brief opinion by Justice Trotter who found that the proceedings were fatally flawed because the name of the prosecutor was not indorsed upon the indictment.²⁰⁴

In *Alfred v. State*,²⁰⁵ Alfred was charged with killing his overseer shortly after learning that a few hours earlier the overseer had forced Alfred's wife to submit to sexual intercourse.²⁰⁶ Justice William L. Harris found reversible error in the conviction of Alfred because the lower court had denied the defendant's challenge of a juror who stated several times that he had heard of the case prior to the trial and that it would require testimony different from the rumors he had heard to remove his impression of the defendant's guilt.²⁰⁷ Justice Harris stated, "It is well settled, that an opinion formed from rumor, so fixed as to require testimony to remove it, constitutes such bias as to render the juror not 'impartial,' and, consequently, under our Constitution, to disqualify him for service."²⁰⁸

Justice Harris's general dedication to the constitutional rights of accused felons, even the "rights" of slaves, offers bal-

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² 4 Miss. (3 Howard) 433 (1839).

²⁰³ *Peter*, 4 Miss. at 433.

²⁰⁴ *Id.* at 434.

²⁰⁵ 37 Miss. 296 (1859).

²⁰⁶ *Alfred*, 37 Miss. at 299.

²⁰⁷ *Id.* at 316.

²⁰⁸ *Id.*

ance against his later mean-spirited comments in *Mitchell v. Wells*,²⁰⁹ which will be discussed in greater detail below. In criminal cases, Harris, like most of his judicial brethren, infallibly demanded that every technical detail be followed when the life of a slave hung in the balance.

As late as 1859, Justice Harris reversed the conviction of a slave charged with assaulting a white in *Jeff v. State*.²¹⁰ The victim in this case testified as follows:

In March, 1859, I had cause to correct the prisoner, and went into the garden where he was at work, and told him I wanted to have some talk with him. He replied that he had done nothing to be whipped for. I caught him by the collar of the coat, and he scuffled with me, and I struck him on the shoulders with a walking cane which I had in my hand. The cane was a good sized stick, and I could probably have killed him with it by striking him on the head, if I had desired to do so. The prisoner put his hand in his pocket and I drew a pistol, and told him I would kill him if he drew his knife. I had him by the collar with my left hand, and led him about fifteen paces, he muttering all the time. I told him I would whip him, or die. About this time my wife came running out to where we were engaged, and I asked her to tie him with a rope which lay near by. Just then the prisoner ran his hand into his pocket, and I again told him, if he drew his knife I would kill him. A moment after he had his knife drawn and commenced cutting me. He inflicted two slight wounds on me; one on my left hand with which I held him, the other on my left side below the arm. I then let him go, and he ran off. This occurred in this county. The knife used by the prisoner was what is commonly called a jack-knife; the blade was about three or three and one-half inches long, and about three-fourths of an inch wide. I would call it a deadly weapon.²¹¹

The defendant argued on appeal that the jury instruction given was improper since it excluded the word "intent" from consideration by the jury.²¹² Harris found this objection rea-

²⁰⁹ 37 Miss. 235 (1859).

²¹⁰ 37 Miss. 321 (1859).

²¹¹ *Jeff*, 37 Miss. at 321-22.

²¹² *Id.* at 325.

sonable and reversed the case.²¹³ Mere technicalities in the law often spell the difference between life and death.

Confessions and the Exclusionary Rule

Well before *Mapp v. Ohio*²¹⁴ and *Miranda v. Arizona*,²¹⁵ the Mississippi high court had developed a sophisticated body of law detailing the means by which confessions could be obtained from criminal defendants and excluding the use of wrongfully obtained evidence. Much of this law developed from slave cases. The seminal case prohibiting the use of confessions wrongfully obtained was *Serpentine v. State*,²¹⁶ in which Justice Cotesworth Pinkney Smith found that a confession beaten out of the white defendant, who could only speak French, was inadmissible in trial.²¹⁷ In this case, the defendant had been "[t]aken from his bed after night, bound to a tree, and lashed in the severest manner."²¹⁸ The court ruled that "the confession of the prisoner ought not to have been given in evidence against him, under a rule of law universally recognized to be founded, not only in the dictates of humanity, but upon the soundest principles of reason."²¹⁹

Serpentine laid the foundation for a long line of antebellum cases providing basic human rights to slaves and people of color accused of capital offenses, though the constitutions of Mississippi, legislative enactments and most case law generally condemned slaves as having no meaningful legal rights beyond the right not to be beaten to death by a master without cause. In *Peter v. State*,²²⁰ Peter had been indicted for the murder of Samuel Harvey, a white man.²²¹ A vigilante party had arrested Peter and threatened to hang him if he did not confess.²²²

²¹³ *Id.* at 326.

²¹⁴ 367 U.S. 643 (1961).

²¹⁵ 384 U.S. 436 (1966).

²¹⁶ 2 Miss. (1 Howard) 256 (1835).

²¹⁷ *Serpentine*, 2 Miss. at 258.

²¹⁸ *Id.*

²¹⁹ *Id.* at 260.

²²⁰ 12 Miss. (4 S. & M.) 31 (1844).

²²¹ *Peter*, 12 Miss. at 31.

²²² *Id.* at 37.

A sentient being, Peter confessed to the killing in lieu of being hanged.²²³ Shortly thereafter, the same citizens brought Peter before a justice of the peace, before whom he again confessed.²²⁴ The lower court excluded at trial the first confession but not the second.²²⁵ The high court found this to be reversible error.²²⁶ Justice Thacher wrote:

[W]hen brought before the justice of the peace, it appears that no caution was given to the accused, respecting the effect of his confessions, and that, thus unwarned, he proceeded to detail statements that fatally criminated himself. . . . [T]here must be very clear and strong evidence of explicit warning by the magistrate, of the consequences of confession, after the fact is known of the existence of either the influence of hope or fear superinducing confession; and it should likewise be manifest, that the prisoner understood such warning, before his subsequent confession could be given in evidence. Lastly, there was nothing in the circumstances attending the subsequent confession, that would have had the effect to dispel the fears previously created in the mind of the accused. Being a slave, he must be presumed to have been ignorant of the protection from sudden violence, which the presence of the justice of the peace afforded him, and he saw himself surrounded by some of those before whom he had recently made a confession.²²⁷

The court finally stated, reaching back to *Serpentine*, that

[i]t is true, that by adopting this rule the truth may sometimes be rejected; but it effects a greater object, in guarding against the possibility of an innocent person being convicted, who from weakness has been seduced to accuse himself, in hopes of obtaining thereby more favor, or from fear of meeting with immediate or worse punishment.²²⁸

²²³ *Id.*

²²⁴ *Id.* at 36-37.

²²⁵ *Id.* at 37.

²²⁶ *Id.* at 39.

²²⁷ *Id.* at 38.

²²⁸ *Id.* at 38-39.

Did *Miranda* more eloquently present this doctrine? Justice Thacher reversed the conviction and ruled that the second confession must also be excluded.²²⁹ Joseph S.B. Thacher, a native of Boston, Massachusetts who settled in Natchez, Mississippi in 1833, served on the high court from 1844 to 1850.²³⁰ A Democrat, he was defeated in his reelection bid by Whig candidate Cotesworth P. Smith, who had previously written *Serpentine*.²³¹

The Mississippi antebellum cases also reveal much about the customs and habits of a slave society. In *Van Buren v. State*,²³² Van Buren had been hired from his master, Birdsong, to Thomas Cooper who

going into his stable at night, on the 15th of December, [] perceived that his horse had been ridden, and supposed, from his appearance, that a bag of potatoes had been carried on him. Suspecting [Van Buren] of having ridden the horse, he called him up next morning and charged him with the fact, and also with having carried off a bag of potatoes. This the prisoner denied. [Cooper] then whipped him, but obtained no confession. In the evening he again took him up, and threatened to whip him again, when he confessed what articles he had, to wit, two jugs of whiskey and two loaves of sugar, and where they could be found, and accompanied [Cooper] to the place and showed him the articles. [Cooper] then asked him to state when and where he had obtained them, when, [Cooper] says, he voluntarily and without any threat, confessed that he had taken them the night before from the store of Birdsong & Gory, which he entered by means of a false key.²³³

The slave was taken to his master the next day where Cooper said to him "Van, here is your master, who has come for the things you took[,] and thereupon the slave again freely con-

²²⁹ *Id.* at 39.

²³⁰ LYNCH, *supra* note 144, at 211-13.

²³¹ *Id.*

²³² 24 Miss. 512 (1852).

²³³ *Van Buren*, 24 Miss. at 515-16.

fessed his actions.²³⁴ This confession was allowed by the lower court to be used against the slave who was found guilty of burglary and sentenced to be branded in the hand and ordered to receive twenty-five lashes each day for four successive days.²³⁵

On appeal, Justice William Yerger stated that the confession made on the second day to the master was erroneously permitted to go to the jury.²³⁶ Yerger found that the slave was not explicitly warned of the consequences of his confession and that no proof had been given that he understood the circumstances against him.²³⁷ The case was reversed.²³⁸

Yerger was a Tennessean who served on the High Court of Errors and Appeals from 1851 to 1854 and was another example of a Whig elected to the court in a strongly Democratic state.²³⁹ Political party affiliation was not generally a factor in the election of antebellum appellate court justices, nor did party affiliation affect their decisions.²⁴⁰ Yerger, like many Whigs, was also a staunch Unionist, though he served in the Mississippi Legislature during the Civil War.²⁴¹

In the case of *Dick v. State*,²⁴² extrajudicial confessions of the accused slaves were introduced in a murder trial where the defendants were accused of killing their master.²⁴³ Chief Justice Smith allowed the confessions to be admitted where there was no proof of the threat of violence against the slaves and they had only been told that "it would be better for the guilty to confess, that the innocent might not be punished."²⁴⁴ The confession in this case had not been tainted by threats of violence or hopes of rewards.²⁴⁵ One of the other errors raised

²³⁴ *Id.* at 516.

²³⁵ *Id.* at 513.

²³⁶ *Id.* at 516.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See SKATES, *supra* note 59, at 106.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² 30 Miss. 593 (1856).

²⁴³ *Dick*, 30 Miss. at 597-98.

²⁴⁴ *Id.* at 598.

²⁴⁵ *Id.*

was that the prisoners had not been valued before sentence of death was pronounced upon them pursuant to the statute allowing the master to recover from the state one-half of the value of his executed slaves.²⁴⁶ The court did not find this issue to constitute reversible error.²⁴⁷

In *Jordan v. State*,²⁴⁸ Jordan was charged with the murder of another slave named Aaron.²⁴⁹ Jordan, after being arrested, refused to talk about the crime.²⁵⁰ His captors told him that if he did not talk that they would kill him.²⁵¹ One of the captors had

a pistol then cocked in his hand, with which he threatened to shoot the prisoner; and the other a stick, with which he threatened to strike, and did strike the prisoner one blow. Under the influence of these threats, and violence thus inflicted, the prisoner proceeded to state the time and place, when and where he lost his knife, describing it at the time.²⁵²

Justice Fisher reversed the case and wrote that this evidence must be excluded in further proceedings against the defendant as follows:

If there is a principle which may be regarded as settled, in the criminal jurisprudence of this country, it is, that the accused has the right, under any and all circumstances, to maintain his silence in regard to the commission of the crime alleged against him, and the rule which protects him against a full confession of guilt, if it appeared that the confession had been extorted by violence, also protects him against testimony which could only be discovered, or made available through the instrumentality of such confession, for otherwise the rule could always be successfully evaded. The rule which

²⁴⁶ *Id.* at 599; see CODE MISS. 1798 TO 1848, ch. 37, art. 2, § 20 (A. Hutchinson comp. 1848).

²⁴⁷ *Dick*, 30 Miss. at 599.

²⁴⁸ 32 Miss. 382 (1856).

²⁴⁹ *Jordan*, 32 Miss. at 385.

²⁵⁰ *Id.* at 386.

²⁵¹ *Id.*

²⁵² *Id.* at 386.

excludes the whole confession must necessarily exclude all its parts.²⁵³

Justice Ephraim S. Fisher, a Whig from Kentucky, was elected to the high court in 1851 and served until 1858.²⁵⁴ This Mississippi slave case laid the groundwork for the United States Supreme Court, which held over 100 years later in *Wong Sun v. United States*,²⁵⁵ that evidence compelled from one against himself and other evidence obtained directly as a result of the wrongfully gained evidence must be excluded.²⁵⁶ Otherwise, the proceedings "would be simply a nullity under the Constitution."²⁵⁷ The Mississippi court found that "the power which restrains the state, equally restrains her citizens in this respect."²⁵⁸

Jordan was weakened in *Sam v. State*,²⁵⁹ in which Justice Handy, a Democrat, found that the confessions of a slave made to his master were not privileged communications where the slave burned his master's gin and cotton house and, after being chained by his master, responded to questioning that he burned the gin and cotton house "because he wished to be hung [sic]."²⁶⁰ The court found in this case that no undue force had been used against the slave.²⁶¹ Further, Justice Handy stated:

It is not to be presumed that the master exercises an undue influence over his slave to induce him to make confessions tending to convict him of a capital offence, because besides the feelings of justice and humanity, which would forbid such efforts, it would be against the interest of the master that the slave should make confessions which would forfeit his life; for he would thereby sustain a loss to the amount of one-half of the value of the slave.²⁶²

²⁵³ *Id.*

²⁵⁴ SKATES, *supra* note 59, at 75.

²⁵⁵ 371 U.S. 471 (1963).

²⁵⁶ *Wong Sun*, 371 U.S. at 493.

²⁵⁷ *Jordan*, 32 Miss. at 387.

²⁵⁸ *Id.*

²⁵⁹ 33 Miss. 347 (1857).

²⁶⁰ *Sam*, 33 Miss. at 351.

²⁶¹ *Id.*

²⁶² *Id.*

Sam's exception to *Jordan's* rule seems to be that confessions to a master, who stood to lose financially, would not be as strictly examined as confessions to a stranger. We note again the surprising effect of the one-half value rule.

The Trials and Tribulations of Josephine

The most fascinating published case of the Mississippi High Court of Errors and Appeals is *Josephine v. State*.²⁶³ *Josephine* speaks not only of the status of Mississippi criminal law in 1861 at the dawn of the war, but more importantly, it enlightens our understanding of the domestic relationships between whites and blacks in slave-holding households. This case has it all—lust, incest, miscegenation, cruelty, revenge, conspiracy and finally, some sort of appellate justice.

Josephine, a slave, was co-indicted in Bolivar County along with George, another slave, for the February 27, 1857, poisoning of Lelia Virginia Jones, the fourteen-month-old daughter of Josephine's master, Lafayette Jones.²⁶⁴ Josephine must have been a woman of rare value—the record indicates that her master hired "Gov. F. and Messrs., B. & S." to prosecute Josephine and *defend her co-defendant*!²⁶⁵ Governor F. was likely Henry S. Foote, governor of Mississippi from 1852 to 1854. Josephine herself, whose material resources must have been very limited, was vigorously defended by "F. Anderson and George V. Moody," two prominent members of the antebellum bar.²⁶⁶ Henry S. Foote, a former United States Senator, had defeated Jefferson Davis for the governorship of Mississippi in 1851.²⁶⁷

The trial judge, J.S. Yerger, was likely related to former high court Justice William Yerger, who had been defeated by Alexander H. Handy in 1853.²⁶⁸ Justice Handy, from Maryland, a staunch secessionist Democrat, and the author of the

²⁶³ 39 Miss. 613 (1860).

²⁶⁴ *Josephine*, 39 Miss. at 643.

²⁶⁵ *Id.* at 627.

²⁶⁶ *Id.* at 642.

²⁶⁷ MICHAEL F. HOLT, *THE POLITICAL CRISIS OF THE 1850S*, at 92 (1978).

²⁶⁸ See SKATES, *supra* note 59, at 79.

rule of *Sam v. State*, would write the high court's opinion in Josephine's case.²⁶⁹ If ever a defendant seemed likely to be hanged in antebellum Mississippi, it would seem to be Josephine.

Lafayette Jones purchased Josephine, a light complexioned mulatto, in 1857 in the markets down in New Orleans.²⁷⁰ She did not want to leave the city and, at the time of her sale, was crying and "taking on considerably" because, according to Master Jones, some other slaves had stolen her jewelry.²⁷¹

Her tears presaged calamity. Upon arrival in Mississippi, Josephine found a deadly cast of characters awaiting her.²⁷² There was Mrs. Jones, the master's wife of only two years.²⁷³ Her testimony revealed a deep resentment and jealousy of Josephine.²⁷⁴ There was old George, her co-indictee, who suffered from rheumatoid arthritis and had been promoted from the fields to yard man twelve to eighteen months prior to the murder.²⁷⁵ Only days before the murder, the master had told the overseer to send George back into the fields to "go to laying off corn-rows with a plow."²⁷⁶ George was unmarried at the time of the murder and the master may have been jealous of George's potential relationship with Josephine.²⁷⁷

Master Jones also owned a slave named Elsey, who had been with him since 1838.²⁷⁸ She had been his cook until the arrival of Josephine, who replaced her in the kitchen.²⁷⁹ Elsey was then also "turned out into the field."²⁸⁰ Elsey was the mother of another of Jones' slaves, Lethe, who still lived on the plantation and who was the mother of a mulatto child who was

²⁶⁹ LYNCH, *supra* note 144, at 508-09.

²⁷⁰ *Josephine*, 39 Miss. at 627.

²⁷¹ *Id.*

²⁷² *See id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 628.

²⁷⁷ *Id.* at 627.

²⁷⁸ *Id.* at 628.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

about eighteen months old at the time of the murder.²⁸¹ Jones may have been the father of both Lethe and Lethe's baby.

Jones owned yet another mulatto slave named Eliza, who was about twenty years of age.²⁸² Eliza, who may have also been jealous of Josephine, proved a critical witness against both Josephine and George.

The trial court judge sailed a tight ship. Defense counsel for Josephine was not allowed to ask the following questions of Jones:

"Did you, shortly after your marriage to your present wife, and whilst in Madison parish, have the woman Elsey, your slave, and the woman slave of yours above spoken of by you, arrested and tied, and so kept for several days, upon a charge made by you that she had poisoned your first wife, and that Elsey had said, shortly before she had been arrested, 'I have put my first mistress under the ground, and will soon put the new one there;' and had you so kept her tied deliberating whether or not you should deliver them to the officers of the law for prosecution?"

"Have you, before the said 27th February, 1857, for some years been in the habit of sexual intercourse with the said woman Lethe, the daughter of Elsey, and are you the father of her mulatto child?"

"Have you, before the 27th February, 1857, for some time been in the habit of sexual intercourse with your said slave Eliza, who is to be a witness in this case?"

"Did you, in New Orleans, and on the afternoon of the day before the day on which you whipped defendant as aforesaid have sexual intercourse with her?"²⁸³

Jones was not forced to answer these questions and could not remember under cross-examination whether he had stated that he would spend half of his fortune to convict Josephine.²⁸⁴

Jones testified on direct examination that Josephine had been under his service about two weeks prior to February 27,

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* (quoting questions asked at trial).

²⁸⁴ *Id.*

1857.²⁸⁵ He had noticed that “she did not move about at [his] house with the life and sprightliness she did in New Orleans.”²⁸⁶ She had good reason. On the morning of the 27th, Mrs. Jones complained that breakfast had been cooked badly, and according to her, “she talked mildly” to Josephine about it.²⁸⁷ Josephine responded “impudently and saucily.”²⁸⁸ Mrs. Jones then complained to her husband who whipped defendant after breakfast that morning.²⁸⁹ “She appeared vexed about the whipping, throwing her head around to her shoulder to see a cut made by the whipping. [Master Jones] don’t [sic] know whether he whipped her with a cowhide or switch.”²⁹⁰ After the whipping, Mrs. Jones, seeking to highlight her absolute authority, called Josephine from the kitchen.²⁹¹ Josephine “did not reply, and turned her back on [Mrs. Jones], and made a face at [Mrs. Jones], and turned over a chair. [Mrs. Jones] then procured the overseer to whip her.”²⁹² The day passed relatively uneventfully thereafter. Elsey and Lethe, who had been “turned out” into the fields, spent the day planting potatoes and George, managing to delay his own trip to the fields, hung around the yard.²⁹³

Josephine prepared dinner for the family that evening.²⁹⁴ The dinner party included Master Jones, Mrs. Jones, a son, their fourteen-month old daughter, Lelia, and a visitor, Mr. Forbes.²⁹⁵ The meal proceeded uneventfully until Mrs. Jones poured a cup of tea for the child and handed it to the child’s nurse.²⁹⁶ The nurse began feeding the tea to the child and Master Jones and Mrs. Jones also began drinking the tea.²⁹⁷ All three of them became ill and began vomiting, though the

²⁸⁵ *Id.* at 626.

²⁸⁶ *Id.* at 627.

²⁸⁷ *Id.* at 628-29.

²⁸⁸ *Id.* at 629.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 627.

²⁹¹ *Id.* at 629.

²⁹² *Id.*

²⁹³ *Id.* at 627.

²⁹⁴ *Id.* at 629.

²⁹⁵ *Id.* at 626.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

son and Mr. Forbes, who had not consumed the tea, were unaffected.²⁹⁸ Master Jones, alarmed, ordered the tea-pot locked in the parlor, sent for the overseer to arrest Josephine and sent for a doctor.²⁹⁹ The three ill family members then retired to their beds.³⁰⁰ The overseer arrested Josephine who was tied and held prisoner.³⁰¹

Dr. C.R. Mason testified that he had seen the sick child, Lelia, on the night of the poisoning.³⁰² He opined that her symptoms indicated arsenic poisoning.³⁰³ Upon cross-examination, he admitted that the poisoning also resembled gastritis, gastroenteritis and Asiatic cholera.³⁰⁴ He could not state positively that the Jones family had been poisoned but thought they had been poisoned with arsenic.³⁰⁵ Critically, the lower court excluded inculpatory admissions to Dr. Mason made by Josephine "because they were procured upon his assurance that, if she would tell all she knew of the matter, [Dr. Mason] would get her off on a steamboat."³⁰⁶ The doctor was, however, allowed to testify that pursuant to Josephine's directions, he found a fragment of a glass vial, partly fused by heat, in the ashes of one of the fireplaces.³⁰⁷

Jones's slave Eliza testified that she had seen the slave, George, give something in a vial to Josephine, shortly before the poisoning.³⁰⁸ She heard him say that it was ratsbane or strychnine and that he had no use for it.³⁰⁹ She stated that Josephine thanked him for the vial.³¹⁰ According to Eliza, when George was looking for the poison, he said that the overseer told him "to go to laying off corn-rows tomorrow, and he

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 630.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

was not able to do it, and wouldn't do it, and that his master was getting tighter on him than he ever had been."³¹¹

George, her co-indictee who was under sentence of death at the time of Josephine's trial, testified that he did not know what was in the vial which he gave to Josephine the night before the poisoning.³¹² He did state that at the time he gave the vial to Josephine that Eliza held a pine torch for him as he handed the vial to Josephine.³¹³ He testified that the night before the poisoning, he heard Josephine and a slave named Charles talking outside of George's house.³¹⁴ George stated, "Charles said he did not know how to fix the papers, and Josephine said she would have them fixed, and they would get a skiff and go to Napoleon or go up the river."³¹⁵ George further testified that "[w]hen the lamentation was going on in the house" that "Charles [another slave] was going towards the horse-lot, and defendant coming behind him, she said, 'Charles, now I have ruined myself,' and he said, 'Yonder's the overseer,' pointing backward, and then she stooped down to pick up some chips."³¹⁶ Charles denied that this conversation occurred.³¹⁷

The slave Abram testified that on the morning following the poisoning, several of the slaves were in the room with Josephine and that a slave, Becky, was "shaming prisoner for having done what was done, and prisoner said, 'For God's sake, hush, people. You make more fuss about it than the white folks do. I am not the first one that did such a crime by ten thousand.'"³¹⁸ Abram's testimony was contradicted by the testimony of another slave, Raney, who was also his wife, who testified under cross-examination that Josephine had said "[f]or God's sake, people, hush. *Even* if I had done it, I am not the first one that has done such a crime by ten thousand."³¹⁹ Raney stated on the day of the poisoning she had been "in the field

³¹¹ *Id.* at 631.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 631-32.

³¹⁷ *Id.* at 633-34.

³¹⁸ *Id.* at 632.

³¹⁹ *Id.* at 632-33.

ploughing, the trash-gang picking up corn-stalks. The field hands were not allowed to go about the kitchen."³²⁰

The overseer, Alston Dixon, testified that in 1854, George had shown him a small vial in which there was white powder.³²¹

The prosecution produced Joseph McGuire who had delivered the teapot to Professor W.D. Moore of Oxford.³²² According to McGuire, Professor Moore, a scientific chemist, had done a forensic analysis on a greenish brown crust in the bottom of the teapot and "on submitting this crust to the proper chemical tests, he procured the pure metal, arsenic, and then procured from the said pure metal octohedral arsenical crystals, or crystalized arsenic."³²³

The defense called Joseph C. Rogers, a white man, who stated that he had been acquainted with Josephine for many years in Paducah, Kentucky, and that she had been a nurse in his family.³²⁴ Rogers testified that "her character for kindness, humanity, and amiability was good."³²⁵

Clearly, anyone living on the Jones plantation might have had motives to poison Lafayette Jones, though none should have had cause to murder his daughter. Josephine, of course, was the prime suspect. She had prepared the evening meal and that day had endured two beatings and possible forced sex with Jones. Mrs. Jones surely resented Lafayette's philandering and appeared to be extremely jealous of Josephine. Elsey, the cook prior to the arrival of Josephine, had just been "turned out into the field."³²⁶ She undoubtedly was not only resentful of Josephine, but was wounded by the loss of house privileges and her concomitant reduction in caste.³²⁷ Her status had been degraded from house servant to the brutish existence of a common field hand.³²⁸ She apparently had also been Master

³²⁰ *Id.* at 633.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 628.

³²⁷ *Id.*

³²⁸ *Id.*

Jones' concubine, as was her daughter Lelia.³²⁹ And, according to the record, she may have once been involved in poisoning his first wife.³³⁰ George, of course, felt he had been wronged by the master who had ordered him into harder labor despite his arthritic condition.

Justice Handy (viewing the facts cynically and interpreting the law strictly) found grounds to reverse the conviction of Josephine upon the technical point that both counts of the indictment charged her as principal and not as accessory.³³¹ He stated that "the rule is well settled at common law that this could not be done."³³² Handy found that the right to have a properly drafted indictment, "was a substantial right of the prisoner and not a mere question of form of proceeding."³³³

Like Justice Clayton in *Wade*, Handy also had to deal with the aggravating Mississippi Legislature. The Legislature targeted Josephine after the trial and during appeal by attempting to cure the faulty indictment by ex post facto legislation.³³⁴ This, Handy ruled, could not be done.³³⁵ He found the technical deficiencies sufficient to warrant reversal:

We do not deem it proper to express any opinion upon the sufficiency of the evidence to sustain the verdict. But it is a sufficient objection to this view, that it is a case depending on circumstantial testimony, in which it is not clearly apparent whether the jury found their verdict upon the belief that the prisoner was guilty as principal, or as accessory [sic].³³⁶

The case was reversed and remanded for a new trial.³³⁷ No extant appellate records document Josephine's ultimate fate on remand. Perhaps a close inspection of Bolivar County records would solve this mystery.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 646-47.

³³² *Id.* at 646.

³³³ *Id.* at 647.

³³⁴ REV. CODE MISS. ch. 514, § 2, art. 2 (1857).

³³⁵ *Josephine*, 39 Miss. at 647.

³³⁶ *Id.* at 647-48.

³³⁷ *Id.* at 651.

CONTRACTS AND TORTS

It is worth a word to note that, in addition to criminal law, much of our modern contract and tort jurisprudence can be easily traced to early slave cases. The principle of respondeat superior in Mississippi evolved from the early case of *Leggett v. Simmons*,³³⁸ wherein Justice Thacher wrote that the liability of a master for the acts of his slave is limited to injuries caused by the slave's acts done pursuant to the master's direction, but not for unauthorized acts.³³⁹

Leggett was followed in *Newell v. Cowan*,³⁴⁰ in which Justice Fisher wrote that where a slave escaping from a neighboring plantation was drowned by other slaves, the master of the killing slaves was not responsible for the tort committed by his slaves,

unless it can be shown that they acted in obedience to some order by him given, or that the act was the result, in some way, of improper conduct on his part, or that he failed, when it was in his power, to exercise his authority over his slaves, and for want of such authority the wrong was committed.³⁴¹

Breach of warranty of the soundness of slaves was decided in *James v. Herring*,³⁴² where proof established that a slave died of dysentery a few weeks after being purchased by the plaintiff.³⁴³ The court found that generally a warranty of soundness would travel with the bill of sale of a slave, but in this instance, the sale took place during a period of time in which such sales were prohibited in the State of Mississippi, and therefore, the buyer could not prevail on a claim of breach of warranty.³⁴⁴ Illegal contracts would not be enforced.³⁴⁵ This issue would later prove particularly galling to Mississippi

³³⁸ 15 Miss. (7 S. & M.) 348 (1846).

³³⁹ *Leggett*, 15 Miss. at 354.

³⁴⁰ 30 Miss. 492 (1855).

³⁴¹ *Newell*, 30 Miss. at 497.

³⁴² 20 Miss. (12 S. & M.) 336 (1849).

³⁴³ *Herring*, 20 Miss. at 336.

³⁴⁴ *Id.* at 341.

³⁴⁵ *Id.*

jurists when the United States Supreme Court weighed into the controversy in *Groves v. Slaughter*,³⁴⁶ and ruled differently, as will be discussed below.

WE COULD GET BY WITHOUT A LITTLE HELP
FROM OUR FRIENDS

The Mississippi Constitution of 1832 banned the importation of slaves as merchandise into the state after May 1, 1833, but allowed immigrants to bring their own slaves into the state until 1845. In 1837, the Legislature passed a statute making in-state slave-trading a misdemeanor punishable by a fine not to exceed \$500 and imprisonment of one to six months for each slave brought into the state for sale. These constitutional and statutory actions reflected the growing slave-related problems confronting Mississippi after the 1830s. Expansion of the state boundaries had opened new lands for settlement thereby increasing not only the white, but also the black population. The Nat Turner rebellion in 1831 undoubtedly spread fear among white Mississippians as they sensed the slave population gaining a potential majority in the 1830s. Further, the established wealthy slave owners in southern Mississippi stood to benefit from the importation ban by enjoying a closed market for selling their own slaves as demands for raw labor in the new northern counties exceeded supply. A few, of course, supported the importation ban on moral grounds. While many whites feared slave insurrections, others were concerned that free blacks would be unable to support themselves in the white dominated society and would constitute an unbearable burden on the state. Still others feared job competition from free blacks.

The Legislature and the courts attempted to deal with these concerns primarily under two theories of law. First, under the belief that each state had the right to regulate the importation of slaves within its own borders, the Legislature constantly tinkered with, and eventually banned, the importation of slaves as merchandise into the state. Second, under the principle of comity, the high court generally upheld the power

³⁴⁶ 40 U.S. (15 Pet.) 449 (1841).

of testators to free, or manumit, their slaves by will, even when legislative statutes provided otherwise. These positions were consistently taken by the post-Joshua Clarke justices. Their rulings were not just motivated by a sense of altruism or humane concern for the plight of the slaves. Rather, the justices and legislators realized that Mississippi had Jefferson's metaphorical wolf by the ears. They believed, on grounds of public safety, that policy decisions dictated reduction of the slave and free black population in Mississippi. If states' rights doctrines and principles of comity were helpful in ensuring such results, then these tools would be so used. These underpinnings for apparently high-minded legislative enactments and solicitous state judicial decisions concerning the discouragement of slavery and the encouragement of freedom were effectively destroyed by subsequent United States Supreme Court decisions.

The constitutional prohibition of the introduction of slaves into the state for sale as merchandise was first tested in *Green v. Robinson*,³⁴⁷ where Justice Trotter found that though the Legislature had failed to provide a penalty for violation of the constitutional provision at the time of its execution, the contract for payment of the slaves sold in violation of the constitution was void.³⁴⁸ Trotter again reached the same conclusion in *Glidewell v. Hite*.³⁴⁹ These opinions were consistent with the emerging state policy against the importation of additional slaves into the state. By 1840, both the Mississippi Legislature and the Mississippi High Court of Errors and Appeals were united in prohibiting the further introduction of slaves as merchandise into the state. The United States Supreme Court, however, was not content to allow Mississippi to stumble toward some local, municipal resolution of the festering slavery problem. The nation's highest Court, in an unfortunate example of appellate judicial arrogance, ruled in 1841 in *Groves*, that a note given in Mississippi for the sale of slaves imported into the state in 1835 was not void, though the state constitu-

³⁴⁷ 6 Miss. (5 Howard) 80 (1840).

³⁴⁸ *Green*, 6 Miss. at 101.

³⁴⁹ 6 Miss. (5 Howard) 110 (1840).

tion expressly forbade such contracts.³⁵⁰ Justice Smith Thompson, writing for the majority, found that since no legislative penalty had been enacted at the time of the contract, the matter was unfinished, and therefore, the contract was enforceable.³⁵¹ Thompson declined to follow the two clearly written state court precedents holding otherwise.³⁵²

Justice John McLean dissented from Thompson's analysis.³⁵³ He asked pointedly:

If Ohio may prohibit the introduction of slaves into it altogether, may not the state of Mississippi regulate their admission?

The Constitution of the United States operates alike on all the states: and one state has the same power over the subject of slavery as every other state.³⁵⁴

Chief Justice Roger B. Taney, not content to remain silent in the matter, felt moved to respond to Justice McLean.³⁵⁵ He wrote separately, but somewhat unclearly, that

the power over this subject is exclusively with the several states . . . and the action of the several states upon this subject, cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Constitution of the United States.³⁵⁶

The power of Congress was not at issue in this case, though Justice McLean had referred to the Commerce Clause in his separate opinion.³⁵⁷ Had the Court used the dormant Commerce Clause to ban the trade of slaves between the states, history might have been different. Chief Justice Taney's view represented the United States Supreme Court's reluctance to interpret the Commerce Clause as a powerful tool by which

³⁵⁰ *Groves*, 40 U.S. at 500-01.

³⁵¹ *Id.* at 503.

³⁵² *Id.* at 498, 503.

³⁵³ *Id.* at 503 (McLean, J., dissenting).

³⁵⁴ *Id.* at 507.

³⁵⁵ *See id.* at 508 (Taney, C.J., concurring).

³⁵⁶ *Id.* *See generally* Paul Finkleman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 276-77 (2000).

³⁵⁷ *See Groves*, 40 U.S. at 505 (McLean, J., dissenting).

the federal government might have been able to staunch the trade of human merchandise between the states in the 1840s.

Groves was not welcome news in Mississippi. Chief Justice Sharkey, the old-line Whig, responded to the United States Supreme Court in 1843 in *Brien v. Williamson*,³⁵⁸ where the Mississippi high court again found that contracts for the purchase of slaves introduced as merchandise for sale since May 1, 1833, were void.³⁵⁹ The Chief Justice measured his frustration with the United States Supreme Court by stating as follows:

We had regarded this question as entirely settled, first by the decision in the case of *Green v. Robinson*, second by the case of *Hite and Fitzpatrick v. Gledwell*, [5 How. 110], and lastly, by a still later case, in which the question was directly presented as a mere question of law, by a demurrer to a plea. Since these cases were decided the same question has been made before the Supreme Court of the United States, in the case of *Groves v. Slaughter*, reported in 15 Peters, in which a different interpretation is given to our constitution, the contract being there held to be valid, whilst we had held it to be null and void. A decision emanating from a court so justly entitled to our highest respect; one whose decisions are received as authoritative throughout this Union, demands of us that we should review our own decisions, and reconsider the question with the utmost possible scrutiny. This we have endeavored to do, and the result has been to strengthen, if possible, the conviction in the correctness of our former decisions.³⁶⁰

Chief Justice Sharkey painstakingly detailed the constitutional and legislative history of slavery in Mississippi, stating that in the early days

[t]he state was then but thinly settled, and the soil and climate being suited to the cultivation of a staple of extensive use, which cannot be extensively cultivated without slave labor, it was easily foreseen that this description of population would multiply to an extent that might be hazardous. . . .

³⁵⁸ 8 Miss. (7 Howard) 14 (1843).

³⁵⁹ *Brien*, 8 Miss. at 16.

³⁶⁰ *Id.* at 15-16.

A distant day was fixed at which the prohibition was to go into effect, that it might not take any one by surprise.³⁶¹

Sharkey stated that "[a] feeling of apprehension began to exhibit itself as early as 1808" and found this constitutional prohibition to be "equivalent to a declaration of safety, and whatever may defeat it is illegal."³⁶² Ironically, unlike later state government clashes with the nation's highest court, the Mississippi jurists clearly held the moral high ground in this dispute, if not for entirely altruistic reasons.

The Mississippi high court was prepared to enforce the constitutional and legislative important bans of new slaves into the state on grounds of public safety, regardless of the mischief created by the United States Supreme Court. Unfortunately, the high court's determination to limit the importation of new slaves into the state could not withstand the popular demand for slave labor.

Popular referenda trumped legislative and judicial pronouncements to the contrary. The 1832 Constitution had forbidden the importation of slaves into the state after 1845.³⁶³ The people amended the Constitution by state-wide referendum in 1844 and authorized the Legislature "to pass such laws regulating or prohibiting the introduction of slaves into this state, as may be deemed proper and expedient."³⁶⁴ This referendum snuffed out any remaining hope that Mississippi could somehow stymie its burgeoning slave population after 1845. In 1846, pursuant to the referendum, the Legislature repealed their prior act prohibiting the importation of slaves into the state as merchandise. In common parlance, the people had spoken and the barn gate had been opened. The United States Supreme Court, by written opinion, and the people, by referendum, destroyed legislative and state judicial attempts to prevent the importation of new slaves as merchandise into the state.

³⁶¹ *Id.* at 25-26.

³⁶² *Id.* at 29-30.

³⁶³ MISS. CONST. of 1832, Slaves, § 2.

³⁶⁴ *Id.*

Comity, as a tool for granting freedom to slaves, would soon face a like fate at the hands of the state and federal courts.

THE UNCOMELY DEMISE OF COMITY

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be the master—that's all."³⁶⁵

Justice Clayton, writing for the court in the 1844 case of *Garland v. Rowan*,³⁶⁶ held, under the principle of comity, that distribution of personal property within this state would be controlled by the laws of Virginia, the intestate's domicile.³⁶⁷ In *Garland*, a portion of the personal estate consisted of slaves in Mississippi.³⁶⁸ The court held that the slaves passed under Virginia rather than Mississippi law since the decedent had been a citizen of Virginia.³⁶⁹

The broad deference to comity enounced in *Garland* was considered again in the 1848 case of *Mahorner v. Hooe*.³⁷⁰ In this action, Chief Justice Sharkey examined the conflict between the laws of two slave-holding states.³⁷¹ The Virginia testator had provided in his will for the emancipation of all his slaves in both Virginia and Mississippi with the proceeds of the sale of his lands to be used for a fund to transport the slaves to Liberia.³⁷² The Mississippi Legislature passed a statute in 1842 prohibiting any person by last will or testament from

³⁶⁵ LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 185 (1871).

³⁶⁶ 10 Miss. (2 S. & M.) 617 (1844).

³⁶⁷ *Garland*, 10 Miss. at 637.

³⁶⁸ *Id.* at 617.

³⁶⁹ *Id.* at 637.

³⁷⁰ 17 Miss. (9 S. & M.) 247 (1848).

³⁷¹ *Mahorner*, 17 Miss. at 272.

³⁷² *Id.*

emancipating slaves or providing for the removal of slaves from the state for the purposes of emancipation.³⁷³ This statute, undoubtedly, was enacted in response to the public outcry over the court's prior holding in the 1840 case of *Ross v. Vertner*.³⁷⁴ Chief Justice Sharkey, true to his nature of strictly following statutes, stated that "[w]e have nothing to say as to the good or bad policy of the law of 1842."³⁷⁵ Chief Justice Sharkey strictly followed the statute banning such testamentary acts and refers to "mere comity" as "an act of courtesy."³⁷⁶ He stated further: "[W]e freely concede that in this confederacy of states, comity is indispensable, and should be extended in the most ample manner, yet it cannot be allowed to defeat the general policy of a state, declared by the legislative authority."³⁷⁷ He ruled that the testator died intestate insofar as the slaves in Mississippi were concerned and that they would go to the distributees as part of the estate rather than receive the benefits of the estate.³⁷⁸

Despite *Mahorner*, comity continued to be a useful judicial doctrine granting intellectual cover to the high court justices as they sought to resolve the conflicts of laws existing not only between slave states and free states, but also among the laws of the various slave states. Comity was the essential tool in manumission cases allowing the high court to rule in favor of freedom. This flexible judicial tool was severely damaged by the United States Supreme Court when it again weighed into the slave controversy in the now-infamous 1857 *Dred Scott* decision in which Chief Justice Taney declared unconstitutional the Missouri Compromise, which had prohibited slavery in certain parts of the United States territories.³⁷⁹ He further aggravated the hotly debated slave question by ruling that when a slave is taken by his master for a temporary residence into a free state and afterwards returns with his master to the original

³⁷³ See Act of Feb. 26, 1842, ch. 4, § 11, 1842 Miss. Laws 65, 69-70.

³⁷⁴ 6 Miss. (5 Howard) 305 (1840); see *supra* notes 162-75 and accompanying text.

³⁷⁵ *Mahorner*, 17 Miss. at 278.

³⁷⁶ *Id.* at 274.

³⁷⁷ *Id.* at 278.

³⁷⁸ *Id.* at 282.

³⁷⁹ See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 454 (1857).

slave state and resumes his residence there, his status and condition on such return is a question exclusively of the law of the original state.³⁸⁰ This holding knocked the legs from under comity as a state doctrine providing cover for rulings in favor of freedom based upon the laws of foreign jurisdictions.

Chief Justice Taney was not content to merely scuttle state court attempts to make the system work. He coarsened the debate and cheapened the issues by stating that at the time of the writing of the Declaration of Independence:

[Africans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.³⁸¹

He followed this diatribe by quoting the Declaration of Independence:

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too

³⁸⁰ *Dred Scott*, 60 U.S. at 452.

³⁸¹ *Id.* at 407.

clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.³⁸²

Dred Scott was worse than just bad law. Chief Justice Taney's intemperate language discouraged racial moderates, such as Justice Handy, and set the pattern for the narrow-minded crudity found in the post-*Dred Scott* opinions of Justice Harris. Prior to *Dred Scott*, slavery was generally referred to by the Justices as a necessary evil or public nuisance. We find no ad hominem attacks on people of color as a basis for holding them in bondage until *Dred Scott* was rendered.

³⁸² *Id.* at 410.

THE HARRIS AND HANDY SHOW

Many historians view judicial opinions in political terms as though a Whig opinion would slant in one direction and a Democrat in another. Others attempt to apply a conservative/liberal or Marxist/capitalist interpretation. Some ideological thinking would lead one to presume that jurists are simply magnetized needles quivering to the right or left, dependent upon the momentary power of competing political poles. The antebellum Mississippi cases defy such an analysis. The record indicates that jurists of very similar backgrounds and apparently identical political persuasions could differ radically in applying the law to slave cases. Such differences are clearly apparent when close scrutiny of the opinions of fellow Justices Harris and Handy are reviewed. Justice Alexander Handy, who served from 1853 to 1867, and William L. Harris, who served from 1858 to 1867, wrote most of the influential slave-related opinions handed down in the years immediately preceding the Civil War. Both were born out-of-state.³⁸³ Handy was born in Maryland in 1809 and came to Mississippi in 1836.³⁸⁴ Harris was born in Georgia in 1807 and moved to Mississippi in 1837.³⁸⁵ Both were Democrats and staunch secessionists and both served as commissioners in 1860 to their native states to deliver the Mississippi Legislature's resolution calling for a Confederate convention.³⁸⁶ Both resigned from the high court in 1867 when military authorities refused to honor Justice Handy's 1866 state court opinion striking down a federal civil rights act.³⁸⁷ Yet, their views on slaves as humans and their recognition of comity as a necessary doctrine to compromise disparities in the laws of slave states and free states differed radically.

One would suspect that Chief Justice Taney's disheartening *Dred Scott* language would eviscerate any state court inclinations to recognize any rights of slaves under the laws of

³⁸³ See SKATES, *supra* note 59, at 79.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

foreign jurisdictions. Such was not the case. Only one year after *Dred Scott*, in 1858, Justice Handy wrote otherwise in *Shaw v. Brown*.³⁸⁸ James Brown died testate as the father of Frances and Jerome Brown, his sons by his slave mistress, Harriet.³⁸⁹ In 1849, James had taken his sons to Ohio and executed a deed of emancipation in their favor.³⁹⁰ He then purchased land for them and settled them in Indiana.³⁹¹ Under his will, he ordered that all of his property, both land and slaves, be sold and the proceeds deposited for the benefit of Frances and Jerome.³⁹² His will was challenged by his white next of kin who claimed that Frances and Jerome had been unlawfully emancipated.³⁹³ Justice Handy disagreed and wrote that under Mississippi law one could not emancipate slaves under foreign laws with the intent of bringing them back to Mississippi as free persons.³⁹⁴ However, in this case Frances and Jerome settled in Indiana.³⁹⁵ Indiana was a free state, and under comity, defined by Justice Handy as respect for the law of other jurisdictions, unless such laws were incompatible with the laws and policy of the forum state, Mississippi was required to recognize the rights of "inhabitants" of other states to own property interests in Mississippi, even if the inhabitants were freed blacks.³⁹⁶ The Court ruled that the bequest was not void and that the freed men could take under the bequest, *Dred Scott* notwithstanding.³⁹⁷

*Trotter v. McCall*³⁹⁸ augurs Justice Handy's inclination to favor human rights over property interests.³⁹⁹ McCall hired a female slave from Trotter for the year 1850 at an agreed price of \$75.⁴⁰⁰ Prior to expiration of the contract, she ran away

³⁸⁸ 35 Miss. 246 (1858).

³⁸⁹ *Shaw*, 35 Miss. at 304.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 305.

³⁹⁵ *Id.* at 306.

³⁹⁶ *Id.* at 316.

³⁹⁷ *Id.* at 321.

³⁹⁸ 26 Miss. 410 (1853).

³⁹⁹ *Trotter*, 26 Miss. at 413.

⁴⁰⁰ *Id.* at 411.

and returned to Trotter because McCall had cruelly whipped her, causing her injury.⁴⁰¹ McCall sought to retrieve her and Trotter offered to send her back if McCall would agree not to whip her again or, if necessary, to whip her only moderately since she was in a "delicate situation incident to females."⁴⁰² McCall refused this offer and promised her a hundred lashes upon her return.⁴⁰³ Trotter refused to return her to McCall who then sued Trotter for breach of contract and obtained a verdict of \$100.⁴⁰⁴ Trotter appealed.⁴⁰⁵ Justice Handy reversed the lower court and, applying the law of bailment to slaves, stated "[w]hen a party hires a slave, he comes under an implied obligation to treat the slave with such care and moderation as an ordinarily prudent master would use towards his own slave."⁴⁰⁶ Handy held that the owner may void the contract if he learns that the hirer uses such ill treatment toward the slave as to cause great abuse or cruel punishment.⁴⁰⁷

Though the courts rarely interfered with the master's treatment of his own slaves, the justices were quick to rule in favor of humane treatment when punishment was to be inflicted outside of the master's immediate control. Such rulings are not surprising when one considers the economics of slavery. The master had a strong economic incentive not to permanently harm, or disfigure, an object of his wealth. One hiring a slave, however, suffered no such economic constraints. Justice Handy instinctively sensed the manner in which economics in a slave society could operate to the benefit or harm of people in bondage. Thus, he was more likely to recognize greater protection under the law for hireling slaves.

Justice Handy also wrote *Leiper v. Hoffman*⁴⁰⁸ in 1853, in which Fanny Leiper, a free woman of color, purchased a lot in

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 413.

⁴⁰⁷ *Id.*

⁴⁰⁸ 26 Miss. 615 (1853).

the city of Natchez with \$175 of her own monies and built a home on the lot for the sum of \$1500.⁴⁰⁹ According to Handy:

[S]he, being a colored woman and single, concluded to advise with her attorney about the drawing of the deed, who advised her to have the deed made jointly to herself and some white person, as there was a great spirit at that time to remove from the State all free persons of color, so that, in the event she should be forced to remove, such white person could manage and dispose of said lot for her benefit, as a trustee for her.⁴¹⁰

At her request, a white friend, Joseph Winscott, then living in New Orleans, was placed on the deed with her jointly.⁴¹¹ Thereafter, her neighbor, Malvina Hoffman, conspired with others to convince Winscott that he had sole legal title in the premises, that Fanny was a slave and could not hold title, that Fanny had run off and that the property was of little value and going to ruin.⁴¹² Pursuant to these assertions, Winscott conveyed the property to Malvina Hoffman for "the nominal sum of \$100, when the property had cost the complainant over \$1,700, and was then well worth \$1,000."⁴¹³

Justice Handy wrote that even if Fanny had been a slave at the time of the conveyance, "the trust continued until that disability was removed by her admission to the rights of a free person, her rights as a cestui que trust would then immediately vest, and she would be entitled to enforce them against the trustee."⁴¹⁴ Justice Handy further found that Hoffman was not entitled to protection as a purchaser without notice since it was apparent that Fanny resided in Natchez on the property for nearly nine years after execution of the deed and no effort had been made to disturb her rights during that time period, that Fanny had paid the taxes and that it had been assessed to

⁴⁰⁹ *Leiper*, 26 Miss. at 615.

⁴¹⁰ *Id.* at 616.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.* at 617.

⁴¹⁴ *Id.* at 623.

her as her property.⁴¹⁵ Justice Handy also indignantly remonstrated Winscott stating:

The circumstances of the affair render the conduct of the parties extremely suspicious. The conduct of the defendant Winscott, as it appears through his answer, would commend him as little to favorable consideration in a court of equity, as in good morals; and the position of the defendant Hoffman does not appear to be much more commendable.⁴¹⁶

Justice Handy reversed the lower court decree and directed that an accounting be taken of the rents and profits lost by Fanny, that the deed to Hoffman be cancelled and that Winscott convey the premises to Fanny Leiper.⁴¹⁷ He could not have been more fair to a white claimant.

Six years later, following *Dred Scott*, Justice Harris ruled opposite from Handy in *Heirn v. Bridault*.⁴¹⁸ Mrs. Bridault, a purported white person, filed suit against the executor of the will of Francis Hall, deceased, arguing that she was the only child and heir of the decedent Hall.⁴¹⁹ Mrs. Bridault testified that Hall had married Angelique, her mother, in New York many years before and that Angelique had died in 1830 in New Orleans.⁴²⁰ Mrs. Bridault further alleged that her father had taken up with one Marcelette Marceau, "a free woman of color" who had induced Hall to believe that his daughter, Mrs. Bridault, was dead.⁴²¹ In fact, she was reared in a convent and later married.⁴²²

Hall devised all of his estate, including three or four slaves, to Marcelette Marceau, also known as the widow Chatteau, the alleged free woman of color.⁴²³ Bridault argued that the bequest was void because Marcelette was a free woman of color who had immigrated to Mississippi contrary to the

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 623-24.

⁴¹⁸ 37 Miss. 209 (1859).

⁴¹⁹ *Heirn*, 37 Miss. at 211.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

statutes and against the policy of the state.⁴²⁴ The executor stated that he did not know whether the widow Chatteau was a free woman of color or not.⁴²⁵ The proof at trial, based upon numerous depositions, went into great detail as to the physical features of the widow Chatteau.⁴²⁶ The issue was disputed whether the claimant, Mrs. Bridault, was the daughter of the testator, who was of French descent, or whether she was of "Irish extraction" as claimed by the widow Chatteau, a charge which Mrs. Bridault vehemently denied.⁴²⁷

One witness, Jacques Combe, stated that he had known Marcelette Marceau two or three months after the former Mrs. Hall's death.⁴²⁸ He stated that she was "a bright mulatto" who had a son who was still darker than her and that her hair was "kinky."⁴²⁹

A Mrs. Clementine Martin testified that she first knew Mrs. Bridault in 1846 when the decedent, Francis Hall, introduced Mrs. Bridault at a wedding where he danced with Mrs. Martin and asked her, "Does she not look just like me? Has she not just my chin?"⁴³⁰ Mrs. Martin also testified that Hall and his wife were both French.⁴³¹ Mrs. Bridault was not of Irish descent.⁴³² Mrs. Martin heard the widow Chatteau accuse Mrs. Bridault of being Irish "twice in the presence of Hall, who got mad, and replied that his daughter had no more Irish blood than he had."⁴³³

Felix M. Jacob testified that he had first seen the widow Chatteau in New Orleans where she lived with Hall as his mistress and that "her sons are much darker than she is; never noticed her hair, as she always wore a handkerchief over her head."⁴³⁴

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 212.

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 212-13.

⁴²⁸ *Id.* at 213.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.* at 214.

⁴³³ *Id.*

⁴³⁴ *Id.* at 214-15.

Justice Harris ignored the precedential value of *Leiper* and ruled against the widow Chatteau, thereby disinheriting her because of her color, and asked rhetorically, "What, then, is the *status* of the African race in the State of Mississippi?"⁴³⁵ Harris then quoted the United States Supreme Court *Dred Scott* opinion which contained Chief Justice Taney's unfortunate language that

the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their decendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . . They had for more than a century been regarded as beings of an inferior order ⁴³⁶

Prior to *Dred Scott*, no Mississippi high court opinion had so coarsely attacked people of color for supposed moral or intellectual inferiority.

Harris went on to cite numerous authorities for his position that "*color is prima facie evidence of slavery*"⁴³⁷ and that "[a] negro, by the laws of this State, is *prima facie* a slave."⁴³⁸ He then stated:

It is, therefore, the policy of this State to interdict all intercourse, commerce, and comity with this race; and by law, expressly provided, we enforce the strictest doctrines of the ancient law, as applicable to *alien enemies*, except as to life or limb, against them. We enslave them for life, if they dare set their foot on our soil, and omit to leave on notice in ten days. And this not upon the principle, supposed by some, of enmity, inhumanity, or unkindness, to such inferior race, but on the great principles of self-preservation, which have induced civilized nations in every age of the world to regard them as only fit for slaves, as wholly incapable, morally and mentally, of

⁴³⁵ *Id.* at 222 (emphasis added).

⁴³⁶ *Id.* (first omission in original) (quoting *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857)).

⁴³⁷ *Id.* at 231 (emphasis added).

⁴³⁸ *Id.* (quoting *Coon v. State*, 21 Miss. (13 S. & M.) 246, 249 (1849)).

appreciating or practising [sic], without enlightenment, the principles and precepts of the Divine and natural law, upon which the laws of international comity are founded.⁴³⁹

He further opined:

[F]ree negroes or persons of color . . . are to be regarded as alien enemies or strangers *prohibiti*, and without the pale of comity, and incapable of acquiring or maintaining rights of property in this State which will be recognized by our courts.

It follows from these views, that the bequest to the free woman of color . . . was void . . .⁴⁴⁰

Justice Handy dissented, saying that the real issue was whether or not the claimant, Mrs. Bridault, was even the daughter of Hall.⁴⁴¹ Handy would have ruled that she was not his child, thus avoiding the racial issue altogether.⁴⁴² He stated that the record was unclear as to whether the widow Chatteau was a citizen of Louisiana or Mississippi, but that if she was a Louisiana citizen and a free person of color, she should be able to take the legacy.⁴⁴³

Justice Harris was not content to simply negate property rights of people of color. He stated in the most definite terms possible the rights of masters to brutally exercise their authority over slaves in the 1860 case of *Oliver v. State*.⁴⁴⁴ Oliver, the white master, was indicted for murder and convicted of manslaughter for killing his slave after an altercation in Oliver's corn-crib.⁴⁴⁵ The deceased slave and another slave named Dick had argued in the crib, and Oliver, who was said to be feeble and smaller than the deceased slave, took a stout stick from the slave and beat him to death.⁴⁴⁶ Apparently, the deceased slave had been subject to fits of mental derangement

⁴³⁹ *Id.* at 232.

⁴⁴⁰ *Id.* at 233.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.* at 234.

⁴⁴⁴ 39 Miss. 526 (1860).

⁴⁴⁵ *Oliver*, 39 Miss. at 527-28.

⁴⁴⁶ *Id.* at 528.

and had been whipped on the day preceding his killing.⁴⁴⁷ Justice Harris recited the duties slaves owed their masters and stated that "unconditional submission and obedience to the *lawful* commands and authority of the master is the imperative duty of the slave, as well as the undoubted right of the master."⁴⁴⁸ In reversing the manslaughter conviction, Harris wrote:

[I]f the master, by inhuman or brutal treatment, endangering the life or limb of the slave, induce resistance necessary on the part of his slave to save his life or limb, and the master, in the further prosecution of his unlawful conduct, take the life of the slave in such conflict, it is equally certain that the master would be guilty of murder. But if the master, in the exercise of lawful authority, in a lawful manner, be resisted by his slave, then the master may use just such force as may be requisite to reduce his slave to obedience, even to the death of the slave, if that become necessary to preserve the master's life, or to maintain his lawful authority.⁴⁴⁹

The High Court of Errors and Appeals in 1856 was composed of Justices Handy and Fisher who served with Chief Justice Cotesworth P. Smith.⁴⁵⁰ Smith did not participate in *Shaw v. Brown*, written by Justice Handy in 1858. Fisher, an anti-secessionist Whig, resigned in 1858 and was replaced by William L. Harris, a staunch secessionist.⁴⁵¹ Harris, apparently joined by Chief Justice Smith, overruled *Shaw* and its precedents in 1859 in *Mitchell v. Wells*.⁴⁵² The majority opinion by Justice Harris and the dissent filed by Justice Handy sharply present the tensions existing in Mississippi just prior to the Civil War. The judicial battle pitted those ready to scuttle comity as a doctrine for mutual cooperation between the states against more moderate justices such as Handy, who

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 540 (emphasis added).

⁴⁴⁹ *Id.* at 539-40

⁴⁵⁰ See SKATES, *supra* note 59, at 23.

⁴⁵¹ See *id.* at 75, 79.

⁴⁵² 37 Miss. 235 (1859).

sought to find some compromise between the bipolar interests of free states versus slave states.

Nancy Wells was a free woman of color, a citizen and resident of the state of Ohio and the daughter of Edward Wells, deceased.⁴⁵³ Wells died in Madison County, Mississippi, in October of 1848 and devised to Nancy a watch, a bed and \$3000 to be paid out of his estate.⁴⁵⁴ Nancy had been freed by her father, the testator, in 1846 when he took her to Ohio.⁴⁵⁵ The lower court ruled in favor of Nancy consistent with the line of cases ending in Justice Handy's 1858 *Shaw* decision.⁴⁵⁶ On appeal, Justice Harris found otherwise, holding that the policy of Mississippi "is opposed to the whole doctrine of negro emancipation."⁴⁵⁷ Harris stated that it is not the policy of Mississippi to augment its African population⁴⁵⁸ and specifically struck down and overruled all prior cases granting certain rights to free persons of color, including *Shaw*.⁴⁵⁹ In unusually harsh language, Justice Harris stated as follows regarding comity and the rights of slaves and free persons of color in Mississippi:

1st. That comity is subordinate to sovereignty, and cannot, therefore, contravene our public policy, or the rights, interests, or safety of our State or people.

2d. That the emancipation, either here or elsewhere, of slaves domiciled in this State, is against our policy, institutions, and laws.

3d. That all laws of other States, and all acts of their citizens or ours, in opposition to our public policy, are void *within the limits of Mississippi*, whatever validity they may be allowed elsewhere.

4th. That the *status* of a slave, in Mississippi, is fixed by our laws, and cannot be changed elsewhere, so as to give him a *new status in this State*, without our consent.

⁴⁵³ *Mitchell*, 37 Miss. at 236-37.

⁴⁵⁴ *Id.* at 237.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 264.

⁴⁵⁷ *Id.* at 250.

⁴⁵⁸ *Id.* at 253.

⁴⁵⁹ *Id.* at 260-63.

5th. That a slave can neither acquire freedom, nor a new domicile, nor any other right or capacity in another State, to be enjoyed in Mississippi, in violation of our policy.

6th. That neither the right to sue, nor the right to acquire or hold property in this State, nor the right to any privileges belonging to free white citizens, or inhabitants of other States or nations, accorded by comity, can be conferred upon the African race, in the State of Mississippi, by the authority of another State or nation.⁴⁶⁰

Harris supported his broad new findings of public policy upon

the nature and character of our institutions; our Constitution and form of government; their nature, character, and whole history; the manners, customs, and habits of our people; our climate, soil, and productions; the resolutions and public acts of her conventions and general assemblies, as sources of evidence indicating public policy[.]⁴⁶¹

Harris reached back into history and stated:

Mississippi came into the Union under this Federal Constitution as a member of this political family, to be associated on terms of political equality, comity, or courtesy with the *white race*, who *alone* by that compact had a right to be thus associated. She came into the Union, not only recognizing the institution of slavery as her best policy, but forbidding the legislature from passing laws for the emancipation of slaves except by consent of the owner. . . . Her climate, soil and productions, and the pursuits of her people, their habits, manners, and opinions, all combine not only to sanction the wisdom, humanity, and policy of the system thus established by her organic law and fostered by her early legislation, but they *require slave labor*.

It was declared in the convention that framed the Federal Constitution, by some of their delegates, that Georgia and South Carolina would become barren wastes without slave labor, and so important did they deem it to their prosperity, that they openly announced that these States would not be-

⁴⁶⁰ *Id.* at 249.

⁴⁶¹ *Id.* at 251.

come parties to the Union if the slave trade should be prohibited.⁴⁶²

Harris also criticized the slaveholding border states north of Mississippi who, according to him, were becoming infected with the abolition feeling. He stated that Mississippi, as a matter of policy, intended by prohibiting the introduction of slaves as merchandise or for sale after May 1, 1833, "*to compel these border States to stand firm by the institution of slavery, by cutting off their market.*"⁴⁶³ Harris also complained of

high tariffs, and other measures of partial legislation, bearing on Southern industry; the low price of cotton, and the consequent depression in the value of slave labor, and reduction of their price, with other causes, alarmed the fears of the border States for the safety of the institution, and inclined them to sell, at tempting rates, to our people, who, by the extraordinary fertility of our soil, still found them profitable in producing cotton.⁴⁶⁴

Justice Harris found comfort in his radical position by quoting Chief Justice Taney in *Dred Scott* in which the United States Supreme Court ruled:

[N]egros whose ancestors were imported into the United States and sold as slaves, "*are not included, and were not intended to be included*, under the word 'citizens' in the Constitution of the United States, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were, at that time, considered a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."⁴⁶⁵

⁴⁶² *Id.* at 252-53.

⁴⁶³ *Id.* at 253-54 (emphasis added).

⁴⁶⁴ *Id.* at 254.

⁴⁶⁵ *Id.* at 259 (quoting *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 393 (1857)).

Harris then stated the extreme view of absolute slavery when he quoted other authorities for the statement that "the slave is entirely deprived. His person and his time being the property of his master, whatever he may accumulate by his own labor, or is otherwise acquired by him, becomes immediately the property of his master."⁴⁶⁶

Harris also took the state of Ohio to task, accusing her of being

forgetful of her constitutional obligations to the whole race, and afflicted with a *negro-mania*, which inclines her to *descend*, rather than elevate herself in the scale of humanity, chooses to take to her embrace, as citizens, the neglected race, who by common consent of the States united, were regarded, at the formation of our government, as an inferior caste, incapable of the blessings of free government, and occupying, in the order of nature, an intermediate state between the irrational animal and the white man.

. . . .

Suppose that Ohio, still further afflicted with her peculiar philanthropy, should determine to descend another grade in the scale of *her peculiar* humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that "comity" will require of the States not thus demented, to forget their own policy and self-respect, and lower their own citizens and institutions in their own scale of being, to meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy?⁴⁶⁷

The Harris opinion reversed the lower court decree which had allowed Nancy to inherit.⁴⁶⁸ Had she returned to claim her inheritance, she would have become part of the estate.

Justice Handy dissented fearlessly and, true to his consistent broad-minded philosophy, stated that the question to be addressed was not the abstract policy of slavery but whether:

⁴⁶⁶ *Id.* at 260.

⁴⁶⁷ *Id.* at 262-64.

⁴⁶⁸ *Id.* at 265.

"[A] person of color," once domiciled and a slave in this State, but afterwards legally removed to another State of this confederacy, and there manumitted according to the laws of that State, and residing there, can acquire or exercise any civil right whatever in this State, the enjoyment of which does not require the residence or individual presence of such person in this State?⁴⁶⁹

Handy argued that the Mississippi Legislature sought first to prohibit free negroes from remaining in this State unlawfully, and to prevent such as might be emancipated out of the State, the owners residing here, from coming into the State; and, 2d, to prohibit emancipation *by last will and testament*, of slaves held in this State, to take effect in other States.⁴⁷⁰

Handy stated that the Legislature, in passing the act prohibiting the emancipation of slaves in Mississippi by will or deed, did not intend to affect the rights of slaves to be emancipated under other laws, nor did it prohibit the right of such free persons of color to hold property interests or take bequests in Mississippi, as long as they were not required to reside in Mississippi.⁴⁷¹ He stated that

[w]e have no control over, or right to complain of, the internal policy of a sovereign State of the confederacy, in allowing rights of person and of property to a free person of color, though we may and do think that that policy is wrong in principle and dangerous in practice.⁴⁷²

Handy further wrote that

the doctrine which debars such a person of a remedy in our courts for such rights as are not in contravention of our declared policy, cannot be justified upon principles of justice, humanity, or sound law. . . . If this State and that of which he is a subject, were foreign nations under treaty of peace and

⁴⁶⁹ *Id.* at 265 (Handy, J., dissenting).

⁴⁷⁰ *Id.* at 270.

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 279-80.

friendship, the denial of such right here would, upon principles of public law, *be just cause of war*.⁴⁷³

Handy lamented the death of comity in Mississippi and stated with great prescience that "if this principle is denied, this Union is the frailest and most imperfect of human fabrics."⁴⁷⁴

FINIS

Slavery in Mississippi was birthed by federal law and nurtured by newcomers from a broad scattering of northern and southern states and other nations. They were Americans. These immigrants shared in common the peculiar institution which would, over time, mold them into Southerners. Antebellum Southerners were Americans intoxicated by a profitable brew distilled from a potent mix of human bondage and rich soil. Of the thirty-one men who served on the high court before the war, only one was a native Mississippian. Roughly the same observation can be made of the state's early governors and legislators. The justices were no less affected by slavery than those engaged in other walks of life. Mississippi was the deepest of the Deep South states and, as a result of profits gained from slave labor, became one of the wealthiest antebellum states in the nation. Yesterday's footfalls echo yet. Mississippi remains the most "southern" of southern states. The bitter fruits of the dysfunctional ethos created by the inherent conflict between freedom and bondage shadow our present. This state annually leads the nation in percentage of teenage pregnancies, percentage of citizens living in poverty and percentage of workers surviving in low-skilled, low-paying jobs. And even today, Mississippians are bitterly split over an issue directly related to slavery's legacy: our retention of a state flag bearing the southern cross.

It is fair to ponder how immigrants in a new state could have so quickly embraced a rock hard defense of an indefensible institution. The answer is economics. Prior to the age of the internal combustion engine, large-scale agriculture was brutish.

⁴⁷³ *Id.* at 282 (emphasis added).

⁴⁷⁴ *Id.* at 283.

Mississippi was born an agricultural haven for adventurous men anxious to secure large tracts of land to grow cotton. Just as the industrial revolution was dawning in the north, the founding fathers of Mississippi sought to defy Adam Smith's pronouncement that no nation dependent only on agriculture could survive in a capitalist world. Their ace card was the institution of slavery. For a season, the northern states tolerated this experiment. Eugene D. Genovese writes:

The defense of Southern slavery need not have consisted of more than two points: that economic interest made it temporarily necessary for the well-being of all sections of the country; and that racial inequality made it temporarily necessary for the safety of all sections of the country. Before long, the argument shifted elsewhere, or rather, it shifted everywhere. The Declaration of Independence and Lockeian political philosophy came under heavy attack from men who had been brought up on them.⁴⁷⁵

A similar view is propounded by Peter Kolchin who writes:

The slave-labor system of the antebellum South was a bundle of contradictions. Established in obscurity without substantial opposition, it generated intense controversy among contemporary Americans and subsequent scholars. Rooted in the lust for profits, it fostered a paternalistic ideology that denigrated crude materialism as a "Yankee" vice. Inextricably linked to the North—and the wider world—through international markets, it produced an intense attachment to section, state, and locality that belied the growing economic interdependence of the modern world. A great success story in terms of economic growth, it left the South seriously underdeveloped both economically and socially. Directed by men whose progenitors had been forward-looking innovators, it ended up in the hands of reactionaries who distrusted reform and feared the future. Predicated upon denial of freedom to a substantial proportion of the population, it was defended by men who talked endlessly of their passionate commitment to "liberty."⁴⁷⁶

⁴⁷⁵ EUGENE D. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE* 123 (1969).

⁴⁷⁶ PETER KOLCHIN, *AMERICAN SLAVERY 1619-1877*, at 170 (1993).

Upon what grounds did these men deny freedom to others? The principle of states' rights, grounded in the United States Constitution and the Territorial Act creating Mississippi, gave force of law to the Mississippi argument that slavery was a local-option matter. The federal license was institutionalized by the two state constitutions and the code. Since the institution could be legally justified and wild profits could only be made using slave labor, men of conscience and vision found it convenient to ignore inner voices which may have whispered freedom. After a time, even immoral legal institutions become accepted and customary. Attitudes shift over time in deference to convenience. Twisted theories and anecdotal conclusions, rather than truth, became the norm. The unacceptable became commonplace. Only the rarest minds rise above their times.

Despite their much-preached message defending the right of the state to enjoy legal bondage, the political establishment of Mississippi, if not her people, sensed impending doom as early as the 1830s when the second constitutional convention, the Legislature and the high court all attempted to end the importation of slaves into the state. These efforts were crippled by the United States Supreme Court in *Groves v. Slaughter* where the Supreme Court, in effect, ruled that Ohio could ban slavery but Mississippi could not constitutionally ban the importation of slaves as merchandise. This federal holding was seconded by the voters when the people amended the Constitution of 1832 by referendum removing the ban on slave importation. The Mississippi high court justices simply could not balance the competing demands of justice and legalized slavery when the people, by referendum, and the United States Supreme Court, by case law, acted in support of the peculiar institution. Truth, justice and broad sentiments of equality could not flourish in a land darkened by the stooped shadows of slavery.

Legal conflicts are inherent where one jurisdiction has the "right" to legalize human bondage and another either does not have that "right," as in the states carved out of the Northwest Territory, or has abolished slavery, as in some, though not all, of the older northeastern states. These conflicts were ameliorat-

ed to a degree by the state court justices, primarily in manumission cases, under the principle of judicial comity.

Paul Finkelman writes:

The decisions of the state judges and the statutes of their legislatures demonstrate how a nation of states was well on its way to dissolving its judicial and legal bonds when secession completed that process. The cases show that interstate comity and harmony were severely tested by slavery and that ultimately slavery undermined and destroyed interstate relations. Most of all, these cases illustrate how individuals and legal institutions attempted to cope with a problem that was, in legal terms, insurmountable.⁴⁷⁷

Finkelman is right that the problems facing legal institutions under slavery were insurmountable. However, insofar as the Mississippi experience is concerned, Finkelman overstates the failure of comity as the cause of the breakup of interstate relations. Comity in Mississippi was used primarily as a judicial tool to move freed blacks *out* of the state. Otherwise, Mississippi found little fault in the laws of other jurisdictions. Until the dawn of the war, when *Mitchell v. Wells* was written, the state courts not only respected free-state laws, but appreciated their safe-port utility as a harbor to ship slaves freed under manumission. Finally, comity did not fail as a legal tool—it was mortally wounded by the United States Supreme Court in *Dred Scott*.

How should we today view the words and acts of men who relied upon federal law to institute and maintain human bondage through two state constitutions, bloody codes and numerous high court decisions? Obviously, economics was the driving force behind early state actions. The promise of great riches fueled the surge of settlers into Mississippi in the early 1800s. Slavery was the necessary means to realize the promise. Slavery affected every institution and every aspect of life in Mississippi. Slavery split churches and families and ruined careers. It is the only institution in American history which promised financial gain to fathers who sold to strangers their sons and

⁴⁷⁷ PAUL FINKLEMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 19 (1981).

daughters. Slavery was an immoral institution serving as the foundation for justice in antebellum Mississippi.

And what effect did such a foundation have on the law of the state? First, though the delegates to the two antebellum state constitutional conventions were out of step with modern notions of freedom and equality, they were in sync with their own financial interests. Their work reflects a dedication to property rights over human rights. They simply reflected their times, places and financial interests. And they were not as far out of step with their northern neighbors as may be sometimes presumed. As noted earlier, some "northern" states tolerated slavery well into the 1840s. Slavery was a peculiar institution indeed. But it was not merely peculiar to a place or a time or to a people. It was a peculiar economic institution which flourished best on rich soil. It ultimately had devastating effects on the regions it encompassed.

Second, Mississippi legislative enactments prior to the Civil War reflect small interest, at best, in respecting human rights for people of color. However, even self-serving statutes sometimes could, through Adam Smith's invisible hand of commerce, turn a sow's ear into a silk purse. The statute allowing recovery of one-half the value of a slave executed by lawful process undoubtedly effected a great desire on the part of slave owners, and the state, to insure a surprisingly vigorous application of constitutional rights by the High Court to slaves charged with capital offenses. "The best laid plans of mice and men"

It is also easy and convenient to take a high-minded stance and blame the federal government, the constitutional delegates and the state legislature for the Mississippi condition in antebellum times. However, the people themselves, when finally given voice in a statewide referendum, grasped culpability by voting, in effect, to open the door for free-wheeling interstate slave trading in 1844 when the Mississippi Constitution was amended to remove the ban on further importation of humans for sale into the state.

Finally, what standards should we apply to the men charged with the fiction of applying justice founded upon an immoral institution? How does one apply the law, which must

be founded on some notions of fairness, within a society founded on and profiting from human bondage?

A.E. Keir Nash discusses the conflict between pure law and the institution of slavery in the South in several articles. He argues for a more equitable interpretation of southern supreme courts in antebellum society.⁴⁷⁸ His grasp of society in general prior to 1861 has more historic validity than some writers who limit their interpretations to a particular political ideology. He cautions against "setting up a moral double-standard whereby we hold the past, for which we have no culpability, to a stiffer standard than we hold the present in which we live, and for which in varying measure we have some culpability."⁴⁷⁹

A more pragmatic view, however, is that all institutions, whether banks or state governments or Rotary Clubs, ultimately act in their own selfish interests. Otherwise, they would not survive. Institutions rarely abnegate self interests. Though institutions have great potential to do good, and often act charitably, the only real hope for good in society must spring from the hearts and minds of individuals. Partisan interests and regional issues shift and change with time. Fairness and truth must be eternal. Great-souled men and women must occasionally fret their hours on the stage and steer institutions aright. Such persons were few in antebellum Mississippi. The institution of slavery affected all other aspects of society. When wrong-headed or immoral institutions, rather than broad-minded ideals, dominate a society, one cannot expect many great-souled individuals to succeed in political affairs. It is unlikely that Voltaire or Rousseau or even one of the Apostles would have been elected to the antebellum state legislature or to statewide office. The dominant ethos prevented such an accident. In fact, under the Constitution of 1817, an Apostle could not seek public office. But jewels of integrity and dedication to

⁴⁷⁸ See generally A.E. Keir Nash, *A More Equitable Past: Southern Supreme Courts and the Protection of the Ante Bellum Negro*, 48 N.C. L. REV. 197 (1969-70); A.E. Keir Nash, *In Re Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274 (1983-84); A.E. Keir Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7 (1979) [hereinafter Nash, *Reason of Slavery*].

⁴⁷⁹ Nash, *Reason of Slavery*, *supra* note 478, at 217.

justice can be found. One appointed justice, Joshua G. Clarke, possessed the courage, idealism and will to declare in 1818 in Mississippi that "slavery is condemned by reason and the laws of nature How should the court decide? . . . I presume it would be in favour of liberty."⁴⁸⁰

Clarke establishes that men of good will and fair minds can speak the truth, even in the worst of times. He refused to hide behind the accepted states' rights argument of his times. *Harry v. Decker* is one of the few decisions of record in antebellum Mississippi appellate case law where the apparent solicitude of the justices cannot be explained in terms of economics or fear. The other case is Justice Handy's *Josephine* opinion.

Meredith Lang, in her excellent study of the Mississippi High Court of Errors and Appeals, concludes:

Given the major premise that the high court was a legal-political institution functioning in a philosophically deviant state, and given the minor premise that the immediate objective of the court was to find an acceptable legal rationalization for the concrete decision, what manner of court was this changing body of three men, all of whom sprang from or were nourished by the intellectual climate of antebellum Mississippi? Cryptically speaking, it was the best and the worst of all possible courts—enlightened and myopic, rational and irrational, compassionate and cruel, just and unjust, intellectually honest and dishonest. The Mississippi High Court simply embodied the noblest and the basest of the qualities of the society in which it flourished.⁴⁸¹

The Mississippi high court was a reflection of contemporary Mississippi society. It is also obvious that a three-member appellate court reflects the individual personalities of the justices to a greater extent than possible under a larger court. The power of personality is magnified in small appellate courts. The Mississippi Legislature and most state citizens could not perceive of Africans in any light beyond the lower form of humani-

⁴⁸⁰ *Harry v. Decker*, 1 Miss. (2 Walker) 36, 42-43 (1818).

⁴⁸¹ MEREDITH LANG, *DEFENDER OF THE FAITH, THE HIGH COURT OF MISSISSIPPI 1817-1875*, at 157 (1977).

ty to which people of color had been denigrated by the institution of slavery—neither could most justices.

The Mississippi high court, however—without regard to political affiliation and regardless of whether the justices were elected or appointed—consistently held the State to the highest standards of proof when capital cases appeared before the court. This phenomenon in Mississippi is consistent with Nash's recognition that "if slave felony cases reached the state supreme courts, most appellate justices increasingly seemed disposed to insist upon something that looks quite like a formally fair trial."⁴⁸² He cites two explanations for this phenomenon: first, a paternalistic desire to protect slavery and second, "sympathy" for the slave as a human being. Two additional reasons overlooked by Nash are the paternalistic aspects of economics and fear.

The opinions of Chief Justice Sharkey and the majority opinions of Justices Harris and Handy, along with Handy's dissent in *Mitchell v. Wells*, substantiate the reality that from the early 1830s until 1862, slave-owners feared slave insurrections and loss of their privileged way of life. Handy, who can be rightly complimented for his persistent efforts to award freedom to slaves in manumission cases, even in the face of state statutes to the contrary, never bowed to populist sentiments in his written opinions. Though a secessionist, he realized that the laws of the free states acted as a relief valve for tension in Mississippi. Though his decisions undoubtedly were sometimes unpopular in Mississippi, his thinking represents a pragmatic view of slavery, and his writings in favor of freedom, as long as the slaves left the state, reflect his concern that a radical increase in the free black population would ultimately pose an insurmountable burden to the institution of slavery. Justice Harris, on the other hand, whose opinions subsequent to *Dred Scott* became strident and bitter, represented that element of society willing to circle the wagons and face ultimate destruction, not only of the Union, but of the southern way of life.

Handy and Harris both, however, vigorously protected the rights of slaves to fair trials and were quick to strike evidence

⁴⁸² Nash, *Reason of Slavery*, *supra* note 478, at 11.

unfairly gained. Paternalism and sympathy may have affected their decisions, but one must also admit that the value of the slave as property could not have been far from their minds. Though Handy was quick to strike confessions made to a mob or magistrate, he found no qualms in allowing a confession made by a slave to his master, reasoning that the master would be presumed to look after the best interest of his property. The master's economic self-interest served as a check and balance against wrongfully gained evidence.

Post-Joshua Clarke high court cases dealing with manumission can also be explained in terms other than sympathetic regard for a plight of others. The writings of Chief Justice Sharkey and Justices Harris and Handy reflect the fear of free-black population growth in the state prior to the Civil War. Undoubtedly, many, if not most, justices shared a genuine concern for the plight of people in bondage. Their opinions, however, more often reflect an overriding concern for public safety. Manumission and comity provided the surest means for them to control the growth of the free-black population in the state.

Future scholars and historians might also consider this brief critique of current literature on the subject. In their efforts to find an abstract body of slave law, many writers fail to differentiate between the maturity of the institution of slavery in the older slave states, such as Virginia and South Carolina, and the relatively new experiment in the younger Deep South states, such as Mississippi. In 1861, much of Mississippi was still in large part a frontier society (images of magnolias and mint juleps notwithstanding) and slave labor was essential to continued prosperity in the nonmechanized agricultural society. Also, in the 1850s, Mississippi served as a "dumping ground" for border state slaveholders who were becoming wary of the dangers, economically and otherwise, of slavery.

Further, some who seek to discuss slave case decisions within the framework of modern legal philosophy often fail to adequately address an inherent conflict existing within the hearts and minds of practically all slave-state appellate court justices prior to 1861. Slavery was such an important part of the southern antebellum way of life that few, if any, appellate

justices were not slaveholders. This conflict prevented southern justices from operating with that certain propriety and objective distance expected in today's modern legal world. It is one thing to enounce impartially a rule of law establishing good title to a railroad when one does not own a railroad. It is quite another to discern the law of merchantable title to a runaway slave when one's own bondsman ironed one's robes. This conflict may also explain the apparent solicitousness of Mississippi justices toward the rights of slaves when reviewing cases of criminal law, their generally sympathetic view of manumission and their often cold-hearted analysis of slavery when commercial interests were at stake. This inherent conflict of interest skews any argument that slave cases were producing a true body of law along accepted judicial norms of reasoning in the South prior to the Civil War.

True justice flows only from springs of the highest ethics and morality. Only individual justices know their true motives. We can judge only the written words of antebellum justices, not their thoughts. In the case of antebellum Mississippi, we discern how an institution—forced slavery—twisted and corrupted all other institutions within its reach. By dawn of war, Mississippi justices were expressing not only fear of the North, but in fact, as Justice Sharkey wrote, fear from their fellow southern neighbors that the border states would begin dumping their own human merchandise into Mississippi. Mississippi had long been withdrawing into itself in religious, commercial and social affairs. By 1861, the strident voices of those like Justice Harris had won the day, and the final surviving institution seeking to bring some reason into a dysfunctional society, the appellate court, collapsed in bitterness and divisiveness.

Yesterday is more real than tomorrow; yesterday was. The antebellum Mississippi constitutions, codes and cases reveal the highest and lowest efforts of men, locked in a time hopelessly out of step with the emerging industrial world, to somehow reason themselves out of impending doom. They could not see the future, for their present was too dark. The Mississippi high court experience begins with the eloquence of Justice Clarke's presumption "in favor of liberty" and ends with Handy's dissenting fear of "just cause of war." Though the state courts were ultimately unable to harness the malevolent ener-

gies imploding in the national consciousness as a result of slavery, some individual justices never quit trying.

Both societal and individual ideals ultimately atrophy in a regime founded on immorality. For while slavery in Mississippi was legal, it was not moral. Those who bartered idealism for gain and those who traded morality for convenience lost the moral authority to enounce truth and her first-born, justice. Finally, having succumbed to darkness, they lost any lasting relevance whatsoever.

COMMENTS

The Federal Faith-Based and Community Initiative: A Guide for Future Legislation

I. INTRODUCTION

"Church and charity, synagogue and mosque lend our communities their humanity, and they will have an honored place in our plans and in our laws."¹ George W. Bush spoke these words in his inaugural address on January 20, 2001.² Nine days later the statement proved more than a mere sentimental expression common to political speeches when the President signed two historic executive orders.³ The first established a White House Office of Faith-Based and Community Initiatives.⁴ The second created Executive Department

¹ President George W. Bush, Inaugural Address (Jan. 20, 2001).

² *Id.* The President's statements represent consistency in his political ideology as expressed in actions taken as the Governor of Texas, such as his encouragement of faith-based organizations to participate in state welfare programs. Press Release, George W. Bush, Governor of Tex. (Dec. 17, 1996) (on file with author).

³ See Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 31, 2001); Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 31, 2001). The President stated as the reason for both of the executive orders to increase opportunities and enhance the capacities of faith-based organizations to meet America's social needs. Exec. Order No. 13,199, 66 Fed. Reg. at 8499; Exec. Order No. 13,198, 66 Fed. Reg. at 8497.

⁴ Exec. Order No. 13,199, 66 Fed. Reg. at 8499. The order proclaimed as the purpose of the White House Office of Faith-Based and Community Initiatives (White House OFBCI) to coordinate a nationwide program to increase the opportunities of faith-based and community organizations and to strengthen their ability to meet America's social needs at the local level. *Id.* The order's policy state-

Centers for Faith-Based and Community Initiatives within the Departments of Education, Labor, Health and Human Services, Housing and Urban Development, and Justice.⁵ One of the

ment encouraged a partnership between the government and faith-based and community groups. *Id.* The policy statement describes the need for these groups to compete on a "level playing field" with other social service groups as long as they "achieve valid public purposes." *Id.* These purposes include (1) overcoming poverty, (2) curbing crime, (3) strengthening neighborhoods and families and (4) conquering addiction. *Id.* Finally, the policy statement decreed the delivery of the social services by these groups should always rest on principles of (1) nondiscrimination, (2) evenhandedness, (3) pluralism and (4) neutrality. Exec. Order No. 13,199, 66 Fed. Reg. at 8499. The goals of the White House OFBCI, in particular, include establishing objectives, priorities and policies for the government's comprehensive plan to enlist and expand, to the extent allowed by law, the work of faith-based organizations. *Id.* The order then lists twelve principal functions of the White House OFBCI. *Id.* First, the White House OFBCI must develop the Administration's policy agenda to expand the role of faith-based and community social services through (1) executive action, (2) legislation, (3) federal and private funding and (4) regulatory relief. *Id.* Second, the White House OFBCI must ensure that the federal government's policies are consistent with the President's stated goals for the initiative. *Id.* Third, the White House OFBCI must integrate the Administration's policy agenda across the Federal Government. Exec. Order No. 13,199, 66 Fed. Reg. at 8499. Fourth, the White House OFBCI must coordinate educational activities to encourage public support for the initiative. *Id.* Fifth, the White House OFBCI must encourage private giving to support the initiative. *Id.* Sixth, the White House OFBCI must inform the President of ideas and policy options for assisting and duplicating successful faith-based and community programs. *Id.* Seventh, the White House OFBCI will provide legal and policy education to public officials at the state and local levels who seek to empower faith-based and other community organizations. *Id.* at 8499-500. Eighth, the White House OFBCI should develop initiatives to strengthen American families and promote a civil society. Exec. Order No. 13,199, 66 Fed. Reg. at 8500. Ninth, the White House OFBCI will herald innovative efforts by nonprofit organizations. *Id.* Tenth, the White House OFBCI must remove unnecessary bureaucratic barriers in legislation and regulations that prevent efforts by faith-based and community organizations to address social problems. *Id.* Eleventh, the White House OFBCI will monitor the implementation of the President's initiative. *Id.* Twelfth, the White House office must ensure the accountability and quality of participating faith-based and other community organizations. *Id.* Next, the executive order describes the administration of the White House OFBCI. Exec. Order No. 13,199, 66 Fed. Reg. at 8500. The White House OFBCI became effective within thirty days of the executive order. *Id.* It will coordinate the initiative with a liaison within each executive department. *Id.* The executive order itself does not create any enforceable right or benefit. See generally Exec. Order No. 13,199, 66 Fed. Reg. 8499-500.

⁵ Exec. Order No. 13,198, 66 Fed. Reg. at 8497. This order outlined the responsibility of federal agencies with respect to the Faith-Based and Community Initiative. *Id.* The Attorney General and Secretaries of Education, Labor, Health

and Human Services, and Housing and Urban Development must establish within each of their departments a Center for Faith-Based and Community Initiatives (Center). *Id.* Each department head must appoint a director for his respective Center. *Id.* The director, through consultation with the White House OFBCI, will supervise each Center. *Id.* The Centers will begin operations within forty-five days of the date of the executive order. Exec. Order No. 13,198, 66 Fed. Reg. at 8497. The Centers, as their overall purpose, will coordinate efforts within their departments to eliminate contracting, regulatory and other obstacles to involvement of faith-based and other community organizations in the provision of social services. *Id.* The Centers will conduct audits of their departments to identify all barriers to the involvement of faith-based and other community organizations in providing social services administered by the department. *Id.* The barriers include all rules, regulations, orders, internal policies and practices, and outreach activities that in any way discriminate, discourage or disadvantage the involvement of faith-based and other community organizations in federal programs. *Id.* The Centers must coordinate departmental efforts to include faith-based and other community organizations in departmental programs "to the greatest extent possible." *Id.* The Centers must propose programs to remove all barriers to involvement of faith-based and other community programs identified in the Center's audits, including barriers in the area of procurement. Exec. Order No. 13,198, 66 Fed. Reg. at 8497. The Centers should propose development of pilot programs that encourage participation of faith-based and other community organizations in federal, state and local government initiative. *Id.* The Centers must develop methods to effectively communicate information about department programming changes and contracting opportunities. *Id.* at 8497-98. This communication should include web and internet resources. *Id.* at 8498. The executive order assigns the Department of Health and Human Services and the Department of Labor additional responsibilities. *Id.* These departments must review all policies and practices that affect the Charitable Choice legislation. Exec. Order No. 13,198, 66 Fed. Reg. at 8498. These departments must also provide an assessment of the departments' compliance with the Charitable Choice legislation. *Id.* On a continuing basis, these two departments must ensure and promote compliance with the Charitable Choice legislation within the departments themselves and by the departments' partners in state and local government and their contractors. *Id.* The executive order also establishes reporting requirements of each Center to the White House OFBCI. *Id.* The Centers should submit the reports on an annual basis. *Id.* The reports will describe the departments' efforts in carrying out the responsibilities described in the executive order. Exec. Order No. 13,198, 66 Fed. Reg. at 8498. The reports must present barriers identified as preventing participation of faith-based and other community organizations in the activities of the department. *Id.* The reports must describe the Center's proposed strategies to remove the barriers. *Id.* The reports must detail technical assistance available to faith-based and other community organizations to participate in the activities of the department. *Id.* This technical assistance should include assistance in the preparation of grant proposals, procurement, cooperative agreements and contracts. *Id.* The first report will provide performance indicators to measure the success of the Center's efforts. Exec. Order No. 13,198, 66 Fed. Reg. at 8498. Subsequent reports will compare Center's results in carrying out its responsibilities under the executive order with the

primary goals of the White House was to identify and eliminate "improper Federal barriers to effective faith-based and community-serving programs through legislative, regulatory, and programmatic reforms."⁶

This comment examines the constitutional issues raised when the government funds faith-based social services. This comment also provides guidance, based on relevant case law and the Charitable Choice provision, for drafting constitutionally sound legislation pursuant to the President's faith-based and community initiative.

II. RELATED LAW

The United States Supreme Court has considered many cases concerning government aid to religious schools and universities and whether that aid violates the Establishment

performance indicators. *Id.* All departments should designate a liaison to coordinate the departments' efforts with the White House OFBCI. *Id.*

⁶ PRESIDENT GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION, H.R. DOC. NO. 107-36, at 6 (2001). This sentiment echoes that of Justice Thomas in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). The dissent in *Mitchell* stated government aid to religious schools represents an "implied exclusion of the less favored." *Mitchell*, 530 U.S. at 793, 868 (Souter, J., dissenting). Justice Thomas retorted that history suggested religious schools represented the real "less favored" in the area of government assistance. *Mitchell*, 530 U.S. at 828. Thomas further stated that past exclusion of "pervasively sectarian" schools from aid provided to other schools arose from bigotry and requires elimination from Establishment Clause jurisprudence. *Id.* (noting historically "sectarian" used as code for "Catholic" and refusal of aid on that basis reflected pervasive hostile sentiment toward Catholics). Barring government aid to religious institutions, otherwise provided to similar secular institutions, may, in fact, violate the Free Exercise clause of the Constitution. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993) (concluding Free Exercise protection violated if law discriminates against religious beliefs). The plurality in *Mitchell* also stated that allowing a pervasively sectarian participant to help the government achieve its secular purpose does not give the participant any "special favor." *Mitchell*, 530 U.S. at 827. Therefore, the pervasively sectarian recipient also should not receive "special hostility" from the government simply because it takes its religion seriously. *Id.* The desire to include religious organizations in the government's social welfare efforts finds supporters in both parties. See Stanley W. Carlson-Theis, "Don't Look to Us": The Negative Responses of the Churches to Welfare Reform, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 667, 669 (1997) (noting that Bill Clinton endorsed bringing together government and religious groups to assist poor people because of religious groups' familiarity with problem of poverty).

Clause of the First Amendment.⁷ Relatively few cases exist, however, that concern Establishment Clause issues arising when the government channels aid to non-educational religious entities.⁸ This section examines the two primary cases concerning non-educational entities and also significant cases involving educational entities relevant to President Bush's faith-based initiative.

A. Non-educational Religious Entities

1. *Bradfield v. Roberts*

In *Bradfield v. Roberts*,⁹ the Supreme Court considered whether an Establishment Clause violation occurred when the federal government agreed to convey property to a hospital affiliated with a church.¹⁰ Congress passed legislation to fund

⁷ See, e.g., *Mitchell*, 530 U.S. at 801 (upholding federal school aid program that distributes funds to local government agencies which in turn lend educational equipment to both public schools and private religious schools); *Agostini v. Felton*, 521 U.S. 203, 209-10 (1997) (upholding federal program allowing public employees to enter private religious schools and provide remedial education to eligible students); *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971) (invalidating Pennsylvania and Rhode Island statutes providing, among other types of aid, salary supplements to teachers of secular subjects in private religious schools); see also Jean-Paul Jassy & Jeffrey H. Blum, *The First Amendment: Gore Versus Bush*, 18 COMM. LAW. 1, 31 (2000) (stating most of the Court's cases in government funding of religion cases involve parochial schools). The Court expressed that government aid to religious schools represents one of the most complex areas of Establishment Clause jurisprudence. *Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (noting "few issues more intricate or demanding" than interaction between schools and religion). The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

⁸ See *Bowen v. Kendrick*, 487 U.S. 589, 593-94 (1988) (upholding federal program providing aid to religious institutions, among other types of entities, for counseling on adolescent sexual relations and pregnancy); *Bradfield v. Roberts*, 175 U.S. 291, 292, 299 (1899) (upholding Congressional grant to hospital owned by Catholic Church); see also Jassy & Blum, *supra* note 7, at 31 (citing *Bowen* and *Bradfield* as only two significant cases dealing with government funding of religion outside the educational arena).

⁹ 175 U.S. 291 (1899)

¹⁰ *Bradfield*, 175 U.S. at 292. The plaintiff brought suit in equity as a taxpayer to enjoin the United States Treasurer, the defendant, from paying any of the funds for the construction of the property. *Id.* The plaintiff stated in the complaint that a decision favorable to the hospital would "speedily obliterate the

construction of a building and then convey it to Providence Hospital, a corporation composed of members of a sisterhood of the Roman Catholic Church, to provide treatment of minor contagious diseases in the city of Washington, D.C.¹¹ The Court held the appropriation did not violate the Establishment Clause¹² The Court found the hospital's purpose to be "utterly secular" and held that the Catholic Church's administration of the hospital was "wholly immaterial" and in no way a violation of the Establishment Clause.¹³

essential distinction between civil and religious functions." *Id.* at 293.

¹¹ *Id.* at 293. The Court noted that nothing in the Act to Incorporate Providence Hospital of the City of Washington, D.C., mentioned either religion or religious faith. *Id.* at 297. The Court characterized the incorporation as no different from that of any other hospital. *Id.*

¹² *Id.* at 299. Courts typically distinguish the *Bradfield* holding based on the exclusively non-sectarian characterization given to the hospital by the Court. *See, e.g.,* Decker v. O'Donnel, 661 F.2d 598, 608 (1st Cir. 1980) (holding that religious elementary and high schools possessed sectarian nature not present in hospital in *Bradfield* and, therefore, much more difficult to monitor for *Lemon's* effect prong). For example, in *Children's Healthcare is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996), the United States District Court for the District of Minnesota held unconstitutional certain exemptions for sanitariums administered by the Christian Science faith in federal Medicare and Medicaid programs. *Vladeck*, 938 F. Supp. at 1486. These exemptions allowed partial federal funding of these institutions. *Id.* The Christian Science Church cited *Bradfield* as an example of federal funding of a sectarian entity deemed constitutional. *Id.* at 1483. The court, however, stated that *Bradfield* did not apply. *Id.* Christian Scientists believe sin, alone, produces disease and sickness. *Id.* at 1469. Their sanitariums, therefore, eschew modern medical technology and rely primarily on prayer and practitioners of "spiritual healing certified by the church." *Vladeck*, 938 F. Supp. at 1469. This type of institution represents a stark contrast to Providence Hospital in *Bradfield*, whose charter in no way indicated an administration different from that of a secular institution. *Id.* at 1484.

¹³ *Bradfield*, 175 U.S. at 298. That the members of the corporation practiced Catholicism did not change the Court's view of the legal character of the corporation. *Id.* The Court held that the religious sympathies of any member of any corporation presented absolutely no legal issue with regard to the nature of the corporation. *Id.* Further, the Court considered any inquiry into the religious beliefs of a corporation's members inappropriate. *Id.* The Court emphasized that the corporation had a "nonsectarian and secular purpose." *Id.* In 1899, when this case came before the Court, however, incorporation required a clearly stated and narrowly defined purpose. *See generally* Louis S. Berkoff, *The Object Clause in Corporate Articles*, 4 WIS. L. REV. 424 (1928) (noting that object clause in corporate charter determines "corporate power"). Modern incorporation statutes allow incorporation with much more ambiguously worded purposes, rendering this rationale considerably less effective. *See, e.g.,* MODEL BUS. CORP. ACT § 3.01(a) (1984) (stat-

2. *Bowen v. Kendrick*

The Supreme Court in *Bowen v. Kendrick*¹⁴ considered whether a federal statute providing funding to public or non-profit private organizations, including religious organizations, for counseling adolescents on sexuality and pregnancy violated the Establishment Clause.¹⁵ Not only could religious organizations qualify as grantees under the statute,¹⁶ but also the statute expressly required all grant applicants to provide a description of the role religious organizations would play in their program.¹⁷ The Court, applying a straightforward *Lemon* analysis, held the statute did not violate the Establishment Clause.¹⁸ First, the statute possessed a legitimate secular

ing "[e]very corporation under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation").

¹⁴ 487 U.S. 589 (1988).

¹⁵ *Bowen*, 487 U.S. at 594. The statute challenged, known as the Adolescent Family Life Act (AFLA), stated as its purposes to (1) find ways of providing guidance to adolescents before they become sexually active, (2) promote adoption, (3) establish integrated approaches for delivery of social services to unmarried adolescents and adolescent parents, (4) encourage research concerning the societal causes and problems of adolescent sexual relations and pregnancy, (5) encourage research to identify effective services to alleviate and eliminate problems of adolescent sexual relations and childbearing and (6) encourage and provide for the communication of the results of the research efforts. 42 U.S.C. § 300z(b)(1)-(6) (1994). The AFLA required each grant applicant to provide a description of the planned involvement of religious and charitable organizations. *Id.* § 300z-5(a)(21). Plaintiffs in the original suit included the American Jewish Congress, clergymen and a group of federal taxpayers. *Bowen*, 487 U.S. at 597. The plaintiffs sought declaratory and injunctive relief on the grounds that the AFLA, on its face and as applied, violated the Religion Clauses of the First Amendment. *Id.* The district court allowed the United Families of America to intervene on behalf of the government and defend the constitutionality of the AFLA. *Id.*

¹⁶ *Bowen*, 487 U.S. at 597. The Court noted grants awarded to a variety of entities including private hospitals, community health associations, charitable associations and state health agencies. *Id.* The Court also noted the award of grants to many organizations with ties to religious denominations. *Id.*

¹⁷ *Id.* at 598. The AFLA recognized the problem of adolescent sex and parenthood as complex and caused primarily by problematic family situations. 42 U.S.C. § 300z(a)(8)(A). The AFLA claimed that an integrated approach involving other family members, religious groups and other private sector groups, as well as publicly sponsored services, provided the best prospect of alleviating the problems associated with adolescent sex and parenthood. *Id.* § 300z(a)(8)(B).

¹⁸ *Bowen*, 487 U.S. at 602-19; see *infra* notes 22-26 and accompanying text.

purpose of reducing the economic and social problems caused by teenage sex.¹⁹ Second, the mere fact that the government (1) recognized that religious organizations should play a part in a grantee's overall program and (2) allowed religious organizations to participate as grantees does not, alone, demonstrate advancement of religion as the statute's primary effect.²⁰ Third, periodic monitoring and review of a religious

The three-pronged *Lemon* test requires that legislation (1) possess a valid secular purpose, (2) neither advance nor inhibit religion as its primary effect and (3) not produce excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Court expressed added assurance that it reached the correct conclusion because Congress also decreed the statute constitutional in the course of its own deliberations. *Bowen*, 487 U.S. at 617. The district court also applied the *Lemon* analysis. *Bowen v. Kendrick*, 657 F. Supp. 1547, 1556 (D. D.C. 1987), *rev'd*, 487 U.S. 589 (1988). In addition to *Lemon*, the Court throughout its analysis in *Bowen* utilized doctrines articulated in cases involving government funding of religious schools. *See, e.g., Bowen*, 487 U.S. at 608, 616 (citing *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976), involving state subsidies to colleges, as support in effect prong analysis, and *Aguilar v. Felton*, 473 U.S. 402 (1985), concerning state employees teaching remedial classes in New York's religious schools, as authority in entanglement prong analysis).

¹⁹ *Bowen*, 487 U.S. at 602-05. The Court stated that even if portions of the AFLA resulted, in part, from certain religious motivations, the same portions also resulted from legitimate secular concerns. *Id.* at 603. The Court found no evidence that Congress created the legislation with the actual purpose of endorsing religion. *Id.* Like the Supreme Court, the district court agreed that Congress passed the AFLA for a valid, secular purpose. *Bowen*, 657 F. Supp. at 1558.

²⁰ *Bowen*, 487 U.S. 608-11. The appellees contended that the statute's explicit requirement that grantees involve religious organizations in the overall effort to solve the problems addressed by the AFLA violated the Establishment Clause. *Id.* at 606-07. The Court flatly rejected this contention. *Id.* at 607. The Court noted that nothing in its Establishment Clause jurisprudence prevents Congress from recognizing the important role religion may play in solving many secular problems. *Id.* The appellees also claimed that the AFLA violated the Establishment Clause because it allowed religious institutions to participate and receive federal funds as grantees. *Id.* at 608. The Court again rejected the appellees' claim. *Bowen*, 487 U.S. at 609. The Court stated that it never held that the Establishment Clause of the First Amendment prevents religious institutions from participating in publicly sponsored social welfare programs. *Id.* The Court stated in *Roemer* that if the task is wholly secular, the government could even employ a "whole clerical order" and not violate the Establishment Clause. *Roemer*, 426 U.S. at 746. The district court in *Bowen* found the AFLA, on its face, failed the effect prong of the *Lemon* test because it allowed direct subsidies to go to religious groups. *Bowen*, 657 F. Supp. at 1561. The district court also found AFLA failed the *Lemon* effect prong because the court did not believe that counselors from religious organizations could put their religious beliefs aside when counseling adolescents about sex and pregnancy. *Id.* at 1563. Additionally, the district court held that an Es-

organization's program does not produce excessive government entanglement with religion.²¹

B. Educational Religious Entities

1. Lemon v. Kurtzman

Lemon v. Kurtzman required the Court to determine whether state programs partially funding religious schools violated the Establishment Clause.²² Rhode Island and Pennsylvania passed statutes providing partial state funding of secular courses taught in the states' private religious schools.²³ The Court held the programs violated the Estab-

lishment Clause violation occurred because, among other reasons, counseling services sometimes occurred in a classroom that contained religious symbols. *Id.* at 1566.

²¹ *Bowen*, 487 U.S. at 616. The government involvement in the program consisted of (1) reviews of the overall program set up by the religious institution, (2) reviews of the counseling materials used and (3) monitoring through periodic visits. *Id.* at 615-17. The Court in *Agostini v. Felton* used the level of monitoring in *Bowen* as an example of the relatively expansive degree of monitoring that can occur that is not necessarily "pervasive" and, therefore, does not produce excessive government entanglement. *Agostini v. Felton*, 521 U.S. 203, 234 (1997). The Court summarily dismissed the holding by the district court that the program would create political divisions along religious lines. *Bowen*, 487 U.S. at 617 n.14. The Court had previously stated such a situation presents one of the primary evils the First Amendment seeks to protect. *Lemon*, 403 U.S. at 622. Here, however, the Court concluded this situation produced an Establishment Clause violation only in the very limited context of direct financial subsidies to parochial schools. *Bowen*, 487 U.S. at 617 n.14. The Court's conclusion that the AFLA does not result in excessive entanglement rests heavily on the determination that "pervasively sectarian" religious institutions do not participate as grantees. *Id.* at 616. The plurality of *Mitchell v. Helms* stated that an organization's "pervasively sectarian" character no longer represents a factor considered as part of the Court's Establishment Clause analysis. 530 U.S. 793, 827 (2000). The district court in *Bowen* concluded the AFLA did violate *Lemon's* entanglement prong. *Bowen*, 657 F. Supp. at 1567. The district court stated that because the AFLA required involvement of religious groups and allowed grants to religious groups, the government can only control the risk that the AFLA funds will further a religious message by continuous monitoring. *Id.* Such continuous monitoring, the district court concluded, produced excessive government entanglement. *Id.* at 1568.

²² *Lemon*, 403 U.S. at 606.

²³ *Id.* at 606-07. The Pennsylvania statute provided funding through reimbursement for teachers' salaries, books and other material in certain secular subjects. *Id.* The Rhode Island statute provided a direct 15% salary supplement for

lishment Clause.²⁴ The Court stated statutes must result from a secular legislative purpose, must not further or inhibit religion and must not produce excessive entanglement of government and religion.²⁵ The Court based its decision on excessive government entanglement produced by the considerable state administrative and financial resources needed to manage the programs.²⁶

teachers of secular courses. *Id.* at 607. With regard to a potential impermissible government purpose, the Court deferred to the Rhode Island statute's stated legislative purpose to protect the quality of education in private elementary schools. *Id.* But see Michael A. Berg, *The Religious Right, Constitutional Values and the Lemon Test*, 1995 ANN. SURV. AM. L. 37, 73 (1995) (claiming that in anticipation of Establishment Clause challenges, legislators often mask religious motivations with secular terms).

²⁴ *Lemon*, 403 U.S. at 625. Though the Court used this decision to announce a new three-part Establishment Clause test, the holding rested primarily on only one prong of the test, impermissible government entanglement. *Id.*

²⁵ *Id.* at 612-13. Various Supreme Court opinions criticize this test as not providing a workable doctrine. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring) (calling for reexamination of *Lemon's* three-part test); *Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (describing *Lemon's* boundary between government and religion as "blurred, indistinct and variable"). In *Lynch v. Donnelly*, the Court stated that its Establishment Clause analysis does not rest on any single test, including *Lemon*. 465 U.S. 668, 679 (1984); see also Melissa M. Feldmeier, Note, *Amazing Disgrace: The Sin and Salvation of Rosenberger v. The University of Virginia*, 65 U. CIN. L. REV. 293, 298 (describing erosion of Supreme Court's reliance on *Lemon's* three-pronged test). Justice Scalia strongly questioned *Lemon's* continued precedential value by stating that "after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). In a dissent to a denial of certiorari for a recent decision by the Fifth Circuit that had used *Lemon* in its analysis, Justice Scalia stated "I would grant certiorari in this case if only to take the opportunity to inter the *Lemon* test once for all." *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of certiorari). Justice Powell, however, praised the *Lemon* test as the only coherent Establishment Clause test ever formulated by a majority of the Court. *Wallace*, 472 U.S. at 63 (Powell, J., concurring). Justice Powell warned that continued criticism by the Court of the *Lemon* test would encourage lower courts to decide Establishment Clause cases on an ad hoc basis. *Id.*; see also David Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 396 (1989) (noting that changes in Establishment Clause doctrines and analytical structures force courts to use ad hoc analyses to address Establishment Clause controversies).

²⁶ *Lemon*, 403 U.S. at 621-22. The Court also warned that political infighting over scarce state resources channeled to religious institutions would cause political

2. *Agostini v. Felton*

In *Agostini v. Felton*²⁷ the Court considered whether a federal program providing remedial teaching services to children in private religious schools violated the Establishment Clause.²⁸ Teachers, employed by the State of New York and funded by the federal program, would enter religious schools to teach remedial secular subjects to disadvantaged children.²⁹ The Court held that a federally funded program, such as this one, allowing government employees to provide supplemental assistance on a neutral basis to disadvantaged chil-

divisions along religious lines. *Id.* at 622-23. Such a situation presents one of the principal evils that the Establishment Clause seeks to eliminate. *Id.* at 622; see Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) (describing unique nature of conflict between politics and religion).

²⁷ 521 U.S. 203 (1997).

²⁸ *Agostini*, 521 U.S. at 209. The Court in *Aguilar v. Felton* previously held this same program did violate the Establishment Clause resulting in a permanent injunction stopping the program. 473 U.S. 402, 413 (1985). In 1995, the Board of Education of the City of New York and a group of parents of parochial school students recognized a shift in the law that governed the original *Aguilar* decision. *Agostini*, 521 U.S. at 214. These petitioners then sought relief in the district court under Federal Rule of Civil Procedure 60(b) from the permanent injunction. *Id.* The petitioners were correct. *Id.* at 235. The Court, here, specifically overruled *Aguilar*. *Id.* It stated *Aguilar* no longer represented good law. *Id.* Further, the Court announced that Establishment Clause law had "significantly changed" since *Aguilar*. *Agostini*, 521 U.S. at 237. The Court stated *stare decisis* does not preclude recognition of a change in the law and overruling a prior decision. *Id.* *Stare decisis* represents a policy judgment preferring settled law to law "settled right." *Id.* This policy, the Court noted, is weakest when the Supreme Court interprets the Constitution. *Id.* The weakness results because the Court's interpretation can only be changed by an amendment to the Constitution or overruling prior decisions. *Id.*; see also *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1956) (noting field of constitutional law allows for only limited application of *stare decisis*).

²⁹ *Agostini*, 521 U.S. at 209. The program gave federal funds directly to the States. *Id.* States, in turn, provided the funds to "local educational entities." *Id.* The program then allowed these entities to spend the funds to provide (1) remedial education, (2) job counseling, (3) mentoring and (4) other pupil services. 20 U.S.C. § 6315(c)(1)(A), (E) (1994). Title I of the Elementary and Secondary Education Act of 1965 created this program. *Agostini*, 521 U.S. at 209. Congress stated that one of the goals of Title I was the provision of "full educational opportunity to every child regardless of economic background." *Id.*

dren does not violate the Establishment Clause, even though the assistance occurs on the premises of a sectarian institution.³⁰ The Court's holding rested on two tests derived from *Lemon*.³¹ First, did the government act with the purpose to advance religion?³² Second, did the government aid, as its primary effect, advance or inhibit religion?³³ Three criteria determine the answer to the second question.³⁴ The aid pro-

³⁰ *Id.* at 234. The Court in *Aguilar* cited excessive entanglement as the reason this program failed Establishment Clause scrutiny. *Aguilar*, 473 U.S. at 412-14. The continuous monitoring required to prevent government employees from in some way advancing religion in the pervasively sectarian environment of the parochial schools primarily gave rise to the Court's conclusion in *Aguilar* that the program produced excessive government entanglement. *Id.* In *Agostini*, the Court did not accept the necessity of continuous monitoring because they refused to presume that when a public school teacher enters a parochial school she will automatically begin indoctrinating the children. *Agostini*, 521 U.S. at 233-34. The Court held that the monitoring provided for under the program—unannounced visits by public supervisors—sufficed. *Id.* at 234. Citing *Bowen*, the Court stated it had not found excessive entanglement in government programs with far more onerous monitoring mechanisms. *Id.* at 234; see also *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764-65 (1976) (finding no excessive entanglement from government reviews of adolescent counseling program administered by religious institutions, reviews of materials utilized and monitoring through periodic visits). "Administrative cooperation" and the dangers of "political divisiveness" also persuaded the Court in *Aguilar* of the presence of excessive entanglement. *Agostini*, 521 U.S. at 233. The Court announced in *Agostini*, however, these two factors by themselves do not produce an "excessive entanglement." *Id.* at 233-34. But see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (prominently using potential political divisions along religious lines as reason for invalidating policy for electing students to give statements as part of pre-game football ceremonies).

³¹ *Agostini*, 521 U.S. at 218. The Court criticized its *Lemon* opinion for stating that it found "independent" entanglement. *Id.* The analyses of the effect of a government program and its entanglement are inextricably linked. *Id.* at 233. Entanglement really represents an aspect of the effect inquiry. *Id.*

³² *Id.* at 222-23. The Court stated that unlike the impermissible effect inquiry, the impermissible purpose inquiry did not change as a result of this decision. *Id.* at 223.

³³ *Id.* at 235. Even though not specifically stated by the Court in the *Agostini* "effect" prong, an assumption that "effect" still means "primary effect" probably is correct as the Court did not refute this articulation from its previous cases. See *Lemon*, 403 U.S. at 612. Bolstering this assumption, the Court characterized "effect" as "primary effect" in cases decided after *Agostini* as well. See *Mitchell v. Helms*, 530 U.S. 793, 808 (2000).

³⁴ *Agostini*, 521 U.S. at 234. The Court stated the same three criteria justify a conclusion that this program cannot reasonably warrant characterization as an endorsement of religion. *Id.*

gram cannot (1) define beneficiaries of the aid by reference to their religion, (2) create excessive entanglement of religion and government or (3) result in government indoctrination of religion.³⁵

3. *Mitchell v. Helms*

In *Mitchell v. Helms*³⁶ the Court decided whether government aid extended to religious schools to supplement non-federal funds resulted in an Establishment Clause violation due to governmental indoctrination or definition of recipients by their religion.³⁷ Pursuant to the program, funds flowed from the federal government to state and then to local agencies to provide schools with secular media materials and com-

³⁵ *Id.* The traditional *Lemon* analysis, therefore, changed, and entanglement became only one component of the effect analysis. See *Lemon*, 403 U.S. at 612. However, some lower courts consider this new incarnation of *Lemon* as only an alternative to a traditional *Lemon* analysis and not at all mandatory. See *Children's Healthcare is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1093 n.6 (8th Cir. 2000) (seizing on language in *Agostini* that general principles used to analyze government aid remain unchanged and interpreting it to mean that following remainder of *Agostini* opinion is merely voluntary). The Court reduced the importance of excessive entanglements in its analysis because the Court recognized that in our society government and religion will inevitably interact. *Agostini*, 521 U.S. at 233. The Court emphasized the importance of recipient definition because that criteria alone might produce the effect of advancing religion by "creating a financial incentive to undertake religious indoctrination." *Id.* at 231.

³⁶ 530 U.S. 793 (2000).

³⁷ *Mitchell*, 530 U.S. at 808. The plurality used the framework provided by *Agostini* to analyze the program. *Id.* The lower court determined that the only violation occurred in the indoctrination and recipient definition criteria of the effect prong. *Id.* The Court's decision focused only on those two issues. *Id.* This case concerned primarily Roman Catholic schools in Jefferson Parish Louisiana. *Id.* at 803-04. Litigation in this case had spanned a fifteen-year history by the time it reached the Supreme Court. *Mitchell*, 530 U.S. at 804. Decisions on this case in the lower courts rested, in part, on two Supreme Court cases. *Id.* The first, *Meek v. Pittenger*, held a government textbook loan program that included "overwhelmingly" sectarian schools violated the Establishment Clause. 421 U.S. 349, 364 (1975). The second, *Wolman v. Walter*, held that a similar book loan program did not violate the Establishment Clause, but the loan of equipment and the funding of personnel to administer the loan program on the parochial school's campus did. 433 U.S. 229, 237-38, 250-51 (1977). The plurality in *Mitchell* characterized these cases as anomalies no longer representing good authority. *Mitchell*, 530 U.S. at 808.

puter hardware and software.³⁸ The Court held that the program did not violate the Establishment Clause because it neither defined recipients by reference to religion nor resulted in governmental indoctrination.³⁹ A government program vio-

³⁸ *Mitchell*, 530 U.S. at 802-03. The statute provided only materials and equipment described as "secular, neutral, and nonideological." 20 U.S.C. § 7372(a)(1) (1994). Receipt of the aid required an application by the school listing the items sought and describing their planned use. *Mitchell*, 530 U.S. at 808. Like the government aid program of *Agostini*, this program operated under the authority of Title I of the Elementary and Secondary Education Act of 1965. *Id.* at 801; see *supra* note 29 and accompanying text.

³⁹ *Mitchell*, 530 U.S. at 808. With regard to the indoctrination issue, the plurality stated the ultimate question as whether one could reasonably attribute indoctrination that occurs at the schools to government action. *Id.* The Court noted that any indoctrination that did occur did not result from government action because of (1) neutral eligibility requirements, (2) aid allocation based on the private choices of the children's parents and (3) lack of impermissible religious content. *Id.* at 829. Whether a program defines its recipients by reference to religion, i.e., whether the program is neutral, appears to gain particular significance in this opinion. *Id.* at 809 (noting government not responsible for indoctrination as long as government provides aid to wide range of groups without regard to their religion). The plurality states that if the government permits eligibility for aid equally to the religious and nonreligious, then no one could reasonably conclude that actual indoctrination by religious groups occurred at the demand of the government. *Id.* Further, the plurality states that if the government, in an effort to promote a legitimate secular purpose, provides aid on the same terms regardless of religion, or lack of religion, then any aid actually flowing to a religious group "only has the effect of furthering that secular purpose." *Mitchell*, 530 U.S. at 810. Justices O'Connor and Breyer concurred with the holding of *Mitchell* but believed that the plurality incorrectly promoted neutrality as the single Establishment Clause test for school aid. *Id.* at 839 (O'Connor, J., concurring). The dissenting Justices held this belief as well. *Id.* at 869 (Souter, J., dissenting).

The dissent outlined the evolution of Establishment Clause jurisprudence as it relates to government aid. *Id.* at 867-75. To guide its analysis, the dissent set forth three concerns of the Establishment Clause. *Id.* at 870-72. The first concern the dissent describes relates to the tyrannical nature of any law requiring a person to support the "propagation of opinions" he does not believe. *Mitchell*, 530 U.S. at 870 (Souter, J., dissenting). Justice Souter's concern over this type of tyranny appears somewhat disingenuous when compared to his defense of the National Endowment of the Arts' funding of "Piss Christ," depicting a crucifix immersed in urine. *Nat'l Endowment of the Arts v. Finley*, 524 U.S. 569, 574 (1998) (Souter, J., dissenting). The second concern involves the corrupting effect of government aid on religion. *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting); see also *Sch. Dist. v. Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring) (stating that mixture of activities of government and religion not only cause concern in nonbeliever, but also deeply devout believer who fears government secularization); *Engle v. Vitale*, 370 U.S. 421, 431 (1962) (stating tendency of religion to destroy government and government to degrade religion as primary basis for

lates the indoctrination criterion only if the aid: (1) is in the form of cash,⁴⁰ (2) contains religious content,⁴¹ (3) is easily

Establishment Clause). The third concern recognizes that, historically, government establishment of religion typically resulted in conflict. *Mitchell*, 530 U.S. at 872 (Souter, J., dissenting).

Aid in the form of vouchers, or some similar mechanism, seems to provide the greatest protection from constitutional challenge. *Mitchell*, 530 U.S. at 817-18. The plurality stated that private choice is easier to discern when the aid actually passes "through the hands of individuals." *Id.* at 816. Likewise, the concurring opinion, written by Justice O'Connor and joined by Justice Breyer, stated that when the aid flows to a religious institution only as a result of the independent decision of a private individual, no reasonable observer could attribute endorsement of a religious message or belief to the government. *Id.* at 842 (O'Connor, J., concurring). The dissent fully agrees on this point as well. *Id.* at 889 (Souter, J., dissenting).

⁴⁰ *Mitchell*, 530 U.S. at 818-19. Even this may not always violate the Establishment Clause because government employees could direct a portion of their paychecks directly to religious institutions. *Id.* at 819 n.8. Such funding results from a wholly private choice, not a choice of the government. *Id.* Private choice represents a critical part of the plurality's analysis, especially with regard to ensuring government neutrality. *Id.* at 810. The combination of private choices and the concept of neutrality eliminate any possible attribution of indoctrination to the government. *Id.* at 829-30; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (holding state employed interpreter used by deaf child in parochial school setting did not violate Establishment Clause because government provided interpreters neutrally to any deaf child and deaf child's parents, not government, chose to send child to religious school). The idea that direct cash aid to religious institutions may not always violate the Constitution is bolstered by the plurality's discussion of the per capita nature of the aid program at issue in *Mitchell*. 530 U.S. at 829-30. The plurality states that the program's allocation of aid based on student enrollment makes the program neutral with regard to religion. *Id.* at 830. The plurality then states that the decisions of private individuals, in deciding where their children will go to school, dictates the amount of aid the religious school receives. *Id.* In other words, "the aid follows to the child." *Id.* This logic appears to provide a basis for a direct cash aid program that possesses the same aid allocation characteristics. See *id.* at 830. All of the justices agree, however, that direct cash aid to religious institutions makes Establishment Clause violation more probable. *Mitchell*, 530 U.S. at 816-17 (commenting that special Establishment Clause dangers arise when government gives money directly to religious institutions instead of money passing indirectly to such institutions through hands of private citizens); *id.* at 856-57 (O'Connor, J., concurring) (stating that prohibition of direct cash aid is based less on dangers of potential diversion and more on violation of original purpose of Establishment Clause); *id.* at 891-92 (Souter, J., dissenting) (claiming easy divertibility of cash to sectarian uses represents primary reason why Court never relaxed its prohibition of direct cash aid); see also *Schempp*, 374 U.S. at 228 (Douglas, J., concurring) (commenting that financing any institution represents most effective way to establish it).

⁴¹ *Mitchell*, 530 U.S. at 820. All nine justices agree on this issue. *Id.* (stating

diverted or divertible to religious purposes,⁴² (4) supplants, rather than supplements, traditional school functions⁴³ or (5) is too substantial.⁴⁴

that as long as aid does not possess religious content, courts cannot attribute indoctrination to government); *id.* at 853 (O'Connor, J., concurring) (recognizing as appropriate evaluation of materials provided by government to religious schools); *id.* at 890 n.10. (Souter, J., dissenting) (expressing agreement with plurality that Establishment Clause "absolutely prohibits" aid to any organization, religious or secular, with religious content). If the aid is suitable in a public school context, then the aid is suitable in a private school context. *Mitchell*, 530 U.S. at 822. Minor violations of the secular content restriction do not invalidate an entire government aid program. *Id.* at 866 (O'Connor, J., concurring).

⁴² *Mitchell*, 530 U.S. at 820. Three different philosophies on divertibility dominate the Court. *Id.* at 826-29. Justices Rehnquist, Thomas, Kennedy and Scalia believe that as long as the government aid does not contain religious content, then whether or not the religious institutions divert the aid to religious uses does not matter. *Id.* at 827. The plurality opinion does not recognize diversion as a legitimate Establishment Clause inquiry. *Id.* at 820. In the plurality's view, if the aid itself does not contain religious content then diversion of the aid to indoctrinate does not implicate the government and does not violate the Establishment Clause. *Id.* at 820-21. Justices O'Connor and Breyer believe actual diversion for religious indoctrination violates the Establishment Clause, but if the program contains adequate safeguards and diversion is *de minimis*, the program will survive constitutional challenge. *Mitchell*, 530 U.S. at 867 (O'Connor, J., concurring). The concurrence also believes minimum safeguards easily overcome the divertibility problem. *Id.* at 852-54 (using computers as example of form of aid that, though easily divertible, does not violate Establishment Clause if government program provides adequate safeguards). Justices Souter, Stevens and Ginsberg would invalidate any program where they find actual diversion to religious purposes or a substantial risk of diversion. *Id.* at 908 (Souter, J., dissenting).

⁴³ *Id.* at 848 (O'Connor, J., concurring). While the plurality in *Mitchell* recognizes the supplement/supplant factor may warrant consideration in some instances, they give the factor little attention. *Mitchell*, 530 U.S. at 819 n.8. Five justices, however, give the factor more weight. *Id.* at 867 (O'Connor, J., concurring) (utilizing supplement/supplant factor in determining indoctrination); *id.* at 896 (Souter, J., dissenting) (stating that precedent requires invalidation of government funding supplanting traditional religious school expense).

⁴⁴ *Id.* at 898; see also *Zobrest*, 509 U.S. at 11 (citing *Meek* for proposition that substantial aid to religious institutions necessarily supports its sectarian mission). Neither the plurality nor the concurrence in *Mitchell* devotes any attention to this factor; however, the dissent considers whether the aid is too substantial as an important factor in the Court's Establishment Clause analytical framework. *Mitchell*, 530 U.S. at 898 n.18 (Souter, J., dissenting). The dissent interprets the plurality's silence on the issue as agreement that substantial aid to religious institutions violates the Establishment Clause. *Id.*

III. THE MODEL: JOHN ASHCROFT'S CHARITABLE CHOICE

In *Rallying the Armies of Compassion*, the President promises that the Federal Government "will play a new role as supporter, enabler, catalyst and collaborator with faith-based and community organizations."⁴⁵ The President then promises to build on previous innovations like the Charitable Choice legislation.⁴⁶ Senator John Ashcroft introduced Charitable Choice as a part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.⁴⁷

Charitable Choice allows states participating in various federally funded social welfare programs to contract directly with religious organizations.⁴⁸ The provision also permits

⁴⁵ PRESIDENT GEORGE W. BUSH, *RALLYING THE ARMIES OF COMPASSION*, H.R. DOC. NO. 107-36, at 6 (2001). While this section deals with the federal model for future legislation, many states also experiment with participation of religious organizations in government social welfare projects. See Cheryl Sullivan, *Welfare in America: What Is Being Reformed?*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 633, 647 (1997) (discussing Mississippi's "Faith and Families" program that allows state welfare officials to match needy families with churches to assist in moving them off welfare by providing advice, networking and other forms of assistance).

⁴⁶ H.R. DOC. NO. 107-36, at 6. The President states that, like Charitable Choice, his initiative will ensure "faith-based community serving groups have a seat at the table." *Id.*

⁴⁷ Senator John Ashcroft, *A Guide to Charitable Choice: A Letter from Senator Ashcroft*, CHARITABLE CHOICE (Ctr. for Pub. Justice, Washington, D.C.), Dec. 1996, available at <http://www.cpjustice.org/charitablechoice/guide/ashcroft>. The Senate passed the Charitable Choice measure by a margin of sixty-seven to thirty-two. 142 CONG. REC. S8508 (daily ed. July 23, 1996). The premise underlying Charitable Choice, and other programs like it, is that government welfare programs failed, and a system of private religious charity should replace the old welfare paradigm. See Jonathan Friedman, Student Research, *Charitable Choice and the Establishment Clause*, 5 GEO. J. ON FIGHTING POVERTY 103, 113 (1997). This view regards religious organizations as superior to government in addressing poverty and hopelessness because, unlike government, religions engage the whole person on physical, moral and spiritual levels. *Id.*

⁴⁸ 42 U.S.C. § 604a(b) (Supp. V 1999). These programs provide (1) monetary assistance to needy families, (2) assistance in ending needy families' dependence on the government by promoting marriage, job preparations and work, (3) guidance to help end out-of-wedlock pregnancies and (4) guidance in the maintenance of two-parent families. *Id.* § 601(a). The Charitable Choice provision also applies to any other program modified or created under Title I or II of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that contracts with organizations directly or permits use of certificates, vouchers, etc. for assis-

states to allow religious organizations to accept certificates, vouchers and other forms of disbursement on the same basis as any other service provider.⁴⁹ The state cannot impair the religious character of an organization participating in the program.⁵⁰

Charitable Choice establishes several unique provisions to encourage participation by religious organizations. First, Charitable Choice creates a nondiscrimination policy ensuring the eligibility of religious organizations to participate in government programs on the same basis as any other organization.⁵¹ Second, a participating religious organization retains its independence from the government, especially with regard to the practice of its religious beliefs.⁵² Third, no government entity can require a participating religious organization to alter its method of internal governance or remove any religious materials such as scripture, art or icons.⁵³ Fourth, even

tance provided by religious organizations. *Id.* § 604a(a)(2)(B). All states receiving federal welfare funds through block grants must comply with Charitable Choice rules even if the states' constitutions prohibit expenditure of public funds by sectarian institutions. *See* Carlson-Theis, *supra* note 6, at 699. The Supreme Court indicated that excluding religious entities from contracting with the government while contracting with secular institutions that provide similar services results in unconstitutional government discrimination against religious individuals. *See supra* note 6 and accompanying text.

⁴⁹ 42 U.S.C. § 604a(b). *See generally* Elizabeth J. Samuels, *The Art of Line Drawing: The Establishment Clause and Public Aid to Religiously Affiliated Child Care*, 69 IND. L.J. 39 (1993) (questioning constitutionality of voucher provisions found in Child Care Development Block Grant Act).

⁵⁰ 42 U.S.C. § 604a(b). Congress created this provision to address fears by many religious conservatives who do not believe government can aid charities without crushing their religious identities. *See* Carlson-Theis, *supra* note 6, at 682-83 (discussing deep skepticism religious conservatives harbor about potential limitations imposed due to partnering with government).

⁵¹ 42 U.S.C. § 604a(c). The neutrality theory provides the underlying basis for this provision. *See generally* Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values – A Critical Analysis of the "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243 (1999) (providing thoughtful critique of neutrality theory). The plurality in *Mitchell* utilizes this theory liberally in its analysis. *See supra* notes 39, 40.

⁵² 42 U.S.C. § 604a(d)(1). This provision attempts to address the concern of many religious groups that partnering with the government will fundamentally alter character of their church. *See infra* note 143.

⁵³ 42 U.S.C. § 604a(d)(2). In *Bowen*, the Court did not accept the district court's position that delivery of social services by religious institutions funded

though a religious organization contracts with the government, it remains exempt from federal employment discrimination laws.⁵⁴ Finally, if the religious organization segregates the federal funds it receives into separate accounts, then the government can only audit the federal funds.⁵⁵

Charitable Choice also provides certain protections to the beneficiaries of the social programs. If a beneficiary objects to the religious character of a participating organization, then the State must provide the beneficiary access to an alternative provider.⁵⁶ The participating religious organization cannot discriminate against beneficiaries on the basis of their religion or their refusal to "actively participate in a religious in a religious practice."⁵⁷

Two provisions of Charitable Choice specifically address the Establishment Clause. First, if a religious organization's social service program violates the Establishment Clause, the organization cannot participate.⁵⁸ Second, religious organizations receiving funds directly from the government cannot use the funds for sectarian instruction, worship or

with government aid in rooms filled with religious symbols violated the Establishment Clause. See *supra* note 20 and accompanying text.

⁵⁴ 42 U.S.C. § 604a(f). Julie A. Segal, Legislative Counsel for the Americans United for Separation of Church and State, commented that this amounts to federally funded employment discrimination on the basis of religion. Julie A. Segal, *Welfare for Churches: Buyers and Beneficiaries Beware*, 5 GEO. J. ON FIGHTING POVERTY 71, 72 (1997).

⁵⁵ 42 U.S.C. § 601a(h)(2). In addition to addressing fears by religious groups over government intrusion into the business of the church, the limited-scope audit appears to be an attempt by Congress to avoid the Establishment Clause danger of impermissible administrative entanglement. See Friedman, *supra* note 47, at 117.

⁵⁶ 42 U.S.C. § 604a(e)(1). Some legal commentators criticize this provision because it does not ensure that beneficiaries receive notice of their right to request an alternative provider. See Segal, *supra* note 54, at 71-72 (criticizing this aspect of Charitable Choice because beneficiaries might assume that they will forgo benefits if they do not utilize religious institutions).

⁵⁷ 42 U.S.C. § 604a(g) (emphasis added). The protection from active participation also enhances § 604(d)(1) by inferring a religious practice, such as praying, may occur during the provision of the social service. See *supra* note 52.

⁵⁸ 42 U.S.C. § 604a(c). Senator Cohen offered this amendment to Senator Ashcroft's original version of Charitable Choice as an attempt to help shield the provision from Establishment Clause lawsuits by the American Civil Liberties Union and others. 141 CONG. REC. S13,517 (daily ed. Sept. 13, 1995).

proselytization.⁵⁹

Currently, no significant legal attacks on Charitable Choice exist.⁶⁰

IV. UTILIZING THE RELATED LAW TO CONSTRUCT FUTURE LEGISLATION

A. General

Legislation enacted as a result of the President's initiative will require adherence to the guidelines provided by the Supreme Court. Even adherence to such guidelines may not provide complete assurance of constitutionality, however.⁶¹ The Court in *Tilton v. Richardson*⁶² admitted "we can only dimly perceive the boundaries of permissible government activity in this sensitive area."⁶³ Past Establishment Clause cases indicate an unwillingness to conform strictly to any one methodology.⁶⁴ The result is a highly fact-specific inquiry involving recurring, but shifting, doctrinal themes with *Lemon* always in the background.⁶⁵

⁵⁹ 42 U.S.C. § 604a(j). Ensuring compliance with this provision may lead to impermissible government entanglement. See Friedman, *supra* note 47, at 112 (evaluating entanglement issues of Charitable Choice). However, Agostini and Bowen do not appear to support this notion. See *supra* note 20 and accompanying text.

⁶⁰ This lack of action by opponents of Charitable Choice may simply reflect the strategy of waiting for the strongest set of facts to arise. See *Charitable Choice*, SAN DIEGO UNION & TRIB., Jan. 30, 2001, at A-1 (quoting spokesman for Rev. Barry Lynn, attorney serving as executive director of Americans United for Separation of Church and State, as stating "You have to play your legal cards carefully. If you challenge this too early, you could lose your case and throw the door open to the whole program."), available at 2001 WL 6440261.

⁶¹ See *supra* note 25 and accompanying text. Shifting Establishment Clause doctrines lead some lower courts to adopt ad hoc approaches to potential Establishment Clause violations. See *supra* note 25 and accompanying text.

⁶² 403 U.S. 672 (1971).

⁶³ *Tilton*, 403 U.S. at 678; see also *Sch. Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring) (stating line between secular and sectarian is elusive).

⁶⁴ See *supra* notes 37-44 and accompanying text. *Mitchell*, for example, demonstrated that no single comprehensive Establishment Clause analytical framework could garner a majority on the Court. See *supra* notes 37-44 and accompanying text.

⁶⁵ See *Mitchell v. Helms*, 530 U.S. 793, 844 (2000) (O'Connor, J., concurring)

Bowen and *Bradfield* warrant attention when drafting legislation as they represent the only significant Supreme Court cases directly addressing government funding of religious institutions outside the educational arena.⁶⁶ *Bradfield*, decided over one hundred years ago, provides an enduring rule in one specific situation.⁶⁷ The religion of the stockholders of an institution providing purely secular services does not present a basis for invalidating government aid to that institution.⁶⁸ *Bradfield* offers more guidance to the service providers in structuring their organizations than to legislators in seeking alternative methods of providing services to poor and disadvantaged citizens.

Unlike *Bradfield*, *Bowen* presents a more relevant factual scenario.⁶⁹ Like programs suggested under the President's initiative and Charitable Choice, *Bowen* involved use by the government of religious institutions to deliver social services.⁷⁰ *Bowen* also presents a more applicable legal framework to analyze programs resulting from the President's faith-based initiative.⁷¹ Still, Establishment Clause jurisprudence has un-

(describing school-aid cases as presenting tension between no-aid and neutrality principles preventing "simple categorization"); *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 847 (1995) (stating that government aid cases require courts to draw fine lines based on very fact-specific inquiries).

⁶⁶ See *supra* notes 9-21 and accompanying text. In both cases the Court upheld the government aid. See *supra* notes 12, 18 and accompanying text.

⁶⁷ See *supra* notes 9-13 and accompanying text. This assertion may not hold true, however, to the extent the Court in *Bradfield* relied on the purpose clause of the hospital's articles of incorporation to base its decision. See *supra* note 13 and accompanying text.

⁶⁸ See *supra* notes 9-13 and accompanying text. If a court characterizes the corporation's purpose as religious, then the court would analyze any government aid program funding the corporation the same as it would for any other type religious institution. See *supra* note 12 and accompanying text.

⁶⁹ See *supra* notes 14-21 and accompanying text. The government grant program in *Bowen* accepted both religious and nonreligious grantees in a neutral fashion. See *supra* notes 16, 20 and accompanying text.

⁷⁰ See *supra* notes 14-21 and accompanying text. Also, *Bowen* addressed the constitutionality of requiring all grant applicants to describe how they would incorporate religious groups in their social service program. See *supra* notes 17, 20 and accompanying text. Though beyond the scope of this comment, the Court's analysis of this aspect of the AFLA may prove relevant to the actual executive orders issued by the President beginning his faith-based initiative. See *supra* notes 4, 5 and accompanying text.

⁷¹ See *supra* notes 18-21 and accompanying text. A court, however, could dis-

dergone numerous changes during the thirteen years since the Court decided *Bowen*.⁷²

Legislators, therefore, when drafting legislation, should rely primarily on the rules and doctrines articulated in the more recent religious school funding cases.⁷³ The reasons used by the Court in the educational arena to uphold or strike down government aid programs may not always transfer to other types of social services.⁷⁴ On numerous occasions, however, the Court suggested that the presence of impressionable children in a school setting compels the use of a stricter Establishment Clause analytical framework than a different type of program might otherwise require.⁷⁵ As a result, adherence to Establishment Clause contours, as defined in the religious school funding cases, provides a sound basis for ensuring a program's constitutionality. Also, the Court has not demonstrated a willingness to strictly compartmentalize its Establishment Clause analyses.⁷⁶ For example, the Court used *Lemon*, a religious school funding case, as the basis for deciding Establishment Clause cases ranging traditional public forums⁷⁷ to prayers at public high school football games.⁷⁸ As

tinguish organizations in *Bowen* from organizations able to participate in Charitable Choice and presumably those that will participate in the President's initiative. See *supra* note 21 and accompanying text. The Court in *Bowen* characterized the religious organizations involved in the AFLA as not pervasively sectarian. See *supra* note 21 and accompanying text.

⁷² See *supra* note 28 and accompanying text. *Bowen* probably reflects an analysis more likely to produce Establishment Clause violation than the analysis currently used by the Court. See *supra* note 28 and accompanying text.

⁷³ See *supra* notes 22-44 and accompanying text. *Agostini* and *Mitchell*, in particular, should serve as guides. See *supra* note 27-44 and accompanying text.

⁷⁴ See *supra* note 21 and accompanying text. For example, in *Bowen*, the Court stated that the issue of potential political divisiveness occurring because of scarce state resources only becomes part of the Court's Establishment Clause analysis in school funding cases. See *supra* note 21 and accompanying text.

⁷⁵ See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (stating student's constitutional freedoms while at school require "scrupulous protection" because schools educate students for citizenship).

⁷⁶ See *supra* note 18 and accompanying text. For some types of cases, though, the doctrines obviously do not transfer. See *supra* note 21 and accompanying text.

⁷⁷ See generally Joshua D. Zarrow, *Of Crosses and Crèches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477 (1986) (discussing application of traditional Establishment Clause doctrines to religious symbols displayed on public property).

⁷⁸ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down

discussed above, the Court used *Lemon* to decide *Bowen*.⁷⁹

Agostini and *Mitchell*, more than any other cases, provide an Establishment Clause framework permitting the President's legislative goals.⁸⁰ Justice Souter, in his dissent in *Agostini*, made the prophetic statement that the decision served "to authorize direct state aid to religious institutions on an unparalleled scale."⁸¹ The President and his administration appear poised to use this authorization.

B. Method of Funding

Legislation providing aid in the form of vouchers directly to individuals creates, under current case law, an almost impenetrable barrier to constitutional challenge.⁸² This invulnerability results because private citizens, rather than the government, direct the disposition of funds.⁸³ The citizen may designate a secular or religious institution to receive the funds.⁸⁴ Any benefit accruing to a religious institution becomes attributable not to government decisions but to decisions of private citizens.⁸⁵ Private citizens, therefore, "ad-

public high school policy of allowing student-led prayer before football games).

⁷⁹ See *supra* notes 18-21 and accompanying text. Practically all the authority the Court used in *Bowen* to determine whether Establishment Clause violation occurred consisted of religious-school funding cases. See *supra* note 18.

⁸⁰ See *supra* notes 28-44 and accompanying text. The President to date has only defined those goals in the broadest terms. See *supra* notes 4-5 and accompanying text.

⁸¹ *Agostini v. Felton*, 521 U.S. 203, 240-41 (1997) (Souter, J., dissenting). Justice Souter further stated that the ban against direct subsidies to religion antedates the Bill of Rights and "has been an unwavering rule in Establishment Clause cases." *Id.* at 243.

⁸² See *supra* notes 40, 49 and accompanying text. This assumes the government allows the use of the vouchers neutrally at both religious and nonreligious institutions. See *supra* note 40 and accompanying text.

⁸³ See *supra* note 40 and accompanying text. Charitable Choice, for example, provides for voucher programs such as this. See *supra* note 49 and accompanying text.

⁸⁴ See *supra* notes 39, 40 and accompanying text. Allowing this option incorporates the necessary element of neutrality. See *supra* notes 39, 40 and accompanying text.

⁸⁵ See *supra* notes 39, 40 and accompanying text. Charitable Choice provides that beneficiaries will always possess the right to choose a secular institution for their social services rather than a religious institution. See *supra* note 56.

vance religion," rather than the government.⁸⁶ This situation does not differ from what undoubtedly already occurs.⁸⁷ The government, for example, provides welfare funds to individuals, and nothing prevents those individuals from tithing those funds to their churches.⁸⁸ The tithed funds advance religion, but the advancement does not result from a decision of the President, a legislator or any other government official.⁸⁹

C. Purpose

Unlike other aspects of the Court's Establishment Clause analysis, the purpose prong remains the same as when first articulated in *Lemon*.⁹⁰ Legislation providing government aid simply requires a secular purpose.⁹¹ Most previous government aid legislation easily met this requirement.⁹² The President plans to address the following poverty-related issues through his new initiative: (1) reduction in crime and drug

⁸⁶ See *supra* notes 39, 40 and accompanying text. This rationale probably explains why, when Congress drafted Charitable Choice, it only prohibited government money from use for proselytizing in cases of direct funding and not in cases of vouchers. See *supra* notes 48-49, 59 and accompanying text.

⁸⁷ See *supra* note 40 and accompanying text. Note that the plurality in *Mitchell* extends this argument to include any government program providing aid based on a per capita allocation. See *supra* note 40 and accompanying text.

⁸⁸ See *supra* note 40 and accompanying text. The plurality in *Mitchell* states that when private citizens direct the government funds, any indoctrination that occurs cannot be attributable to the government. See *supra* notes 39-40, 59 and accompanying text.

⁸⁹ See *supra* note 40 and accompanying text. Such channeling of government funds through the decisions of private individuals does not violate even the stricter framework of *Lemon*. See *supra* notes 22-26 and accompanying text.

⁹⁰ See *supra* note 32 and accompanying text. This prong appears to be the easiest to pass. Even if a goal of the legislation coincides with the tenets of a religious faith, the Court can still decide it possesses a secular nature as well. Cf. *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985) (holding Alabama statute requiring one-minute moment of silence violated Establishment Clause because legislators passed statute with purpose to advance religion).

⁹¹ See *supra* notes 13, 19 and accompanying text. *Bowen* and the Charitable Choice legislation both provide examples of acceptable secular purposes. See *supra* notes 19, 48 and accompanying text.

⁹² See *supra* notes 19, 29, 32 and accompanying text. The Court does look, however, at the circumstances surrounding the legislation to see whether the stated secular purpose simply represents a pretext for a religious purpose. See *supra* note 19.

use, (2) education, (3) facilitation of entry into the workforce, (4) care for children with parents in prison, (5) care for children awaiting adoption, (6) reduction in the number of babies born out of wedlock and (7) enhancement of the income of families with children earning less than \$17,000 per year.⁹³ All of these issues provide valid, secular purposes for the government aid.⁹⁴

D. Effect

Legislation cannot produce as its principal or primary effect the advancement or inhibition of religion.⁹⁵ This portion of the Court's analysis historically presented the greatest problem in drafting constitutionally sound legislation.⁹⁶ Any legislation drafted pursuant to the President's initiative must consider the following criteria to ensure the legislation does not produce the impermissible effect of advancing religion.

1. Entanglement

Government aid programs cannot create excessive entanglement of government with religion.⁹⁷ In the past, legislators typically created monitoring mechanisms to ensure that gov-

⁹³ PRESIDENT GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION, H.R. DOC. NO. 107-36, at 1 (2001). The President encourages states to create similar programs, and these programs may greatly expand on the purposes articulated in the President's initiative. *Id.*

⁹⁴ See *supra* notes 13, 19, 25, 32 and accompanying text. A purpose such as the reduction of the number of children born out of wedlock does not violate the Establishment Clause simply because it coincides with the tenets of a particular religious faith. See *infra* note 129 and accompanying text.

⁹⁵ See *supra* notes 20, 25, 33, 35 and accompanying text. The concurring and dissenting Justices in *Mitchell* believed that the plurality replaced any reasoned analysis of a legislation's effect with the concept of neutrality. See *supra* note 39 and accompanying text.

⁹⁶ See *supra* note 30 and accompanying text. One reason for this result involved monitoring mechanisms in the legislation to ensure that advancement of religion did not occur, but these same mechanisms would then violate the excessive entanglement prong of *Lemon*. See *supra* notes 26, 30 and accompanying text.

⁹⁷ See *supra* notes 21, 25-26, 30, 35 and accompanying text. Administrative cooperation and possible political divisiveness alone will no longer justify a finding of excessive entanglement. See *supra* note 30 and accompanying text.

ernment aid did not advance religion.⁹⁸ These monitoring mechanisms, under the *Lemon* analysis, often violated the entanglement prong of *Lemon*.⁹⁹ Legislators could not easily solve this dilemma.¹⁰⁰ With *Agostini*, the Court relegated the entanglement question to one of three criteria under the effect prong and indicated a willingness to accept a higher level of entanglement than in the past.¹⁰¹

The Court recognized that in our society, church and state inevitably interact.¹⁰² The Court also recognized that entanglement will occur and therefore only required no *excessive* entanglement.¹⁰³ The Court in *Agostini* cites two cases, *Bowen* and *Roemer v. Board of Public Works*, as examples of entanglements it does not consider excessive.¹⁰⁴ In *Bowen*, the government reviewed the religious institutions' programs, reviewed materials used in the programs and made periodic visits.¹⁰⁵ In *Roemer*, the government conducted audits of

⁹⁸ See *supra* notes 18, 30 and accompanying text. Charitable Choice also includes monitoring through financial audits. See *supra* note 55 and accompanying text.

⁹⁹ See *supra* notes 21, 25-26, 30, 35 and accompanying text. The district court's analysis in *Bowen* provides a classic example of monitoring to prevent advancement of religion resulting in the program's invalidation under *Lemon's* excessive entanglement prong. See *supra* note 21.

¹⁰⁰ See *supra* note 30. In *Aguilar*, the Court concluded that excessive entanglement from monitoring would necessarily result. See *supra* note 30. The Court presumed that when public school teachers enter a parochial school they automatically begin to indoctrinate the children. See *supra* note 30. In *Agostini*, the Court abandoned this presumption. See *supra* note 30.

¹⁰¹ See *supra* note 35 and accompanying text. Later, in *Mitchell*, the Court reaffirmed that *Agostini* narrowed the factors that would justify a conclusion of excessive entanglement. *Mitchell v. Helms*, 530 U.S. 793, 793 (2000).

¹⁰² See *supra* note 35 and accompanying text. The AFLA, Charitable Choice and the President's faith-based initiative go even further and require this interaction. See *supra* notes 4, 5, 15, 28 and accompanying text.

¹⁰³ See *supra* note 30 and accompanying text. The Court in *Agostini* implied that violation of the excessive entanglement criterion requires considerably more than simple periodic monitoring to ensure that the funds do not promote sectarian indoctrination. See *supra* note 30 and accompanying text.

¹⁰⁴ See *supra* notes 21, 30 and accompanying text. The Court's characterization of the religious institutions involved with the AFLA as not pervasively sectarian provides a basis for distinguishing the entanglement conclusion reached in *Bowen* from other cases. See *supra* notes 21, 30 and accompanying text.

¹⁰⁵ See *supra* note 21 and accompanying text. This level of review far exceeds the level provided in the Charitable Choice legislation. See *supra* notes 52-55 and

grant funds to religious colleges to ensure the colleges did not use the funds for religious purposes.¹⁰⁶ Legislation drafted pursuant to the President's initiative, therefore, can require program monitoring and review of the materials used.¹⁰⁷ Legislation can also require audits to ensure the institution utilizes the funds for secular purposes and not to advance the religion.¹⁰⁸ A program designed similarly to Charitable Choice, which requires audits, would fall well within the Court's permissible entanglement threshold.¹⁰⁹

2. Definition of Recipients

Government aid programs cannot define aid recipients by reference to their religion.¹¹⁰ This requirement is easily met.¹¹¹ The program must require distribution of aid to beneficiaries on a neutral and secular basis.¹¹² The criteria for allocation of aid can neither favor nor disfavor religion.¹¹³ The religious institution cannot discriminate between religious

accompanying text.

¹⁰⁶ See *supra* note 30 and accompanying text. Charitable Choice contains a similar provision. See *supra* note 55 and accompanying text.

¹⁰⁷ See *supra* notes 21, 30 and accompanying text. Under the plurality's analysis in *Mitchell*, however, if the government distributes the aid neutrally and the aid flows to religious institutions as a result of private choice, then no type of monitoring is required. See *supra* notes 39, 40 and accompanying text.

¹⁰⁸ See *supra* notes 21, 30 and accompanying text. Again, the *Mitchell* plurality apparently would not require such audits in instances of neutrality combined with private choice. See *supra* notes 39, 40 and accompanying text.

¹⁰⁹ See *supra* note 55 and accompanying text. Charitable Choice limits its audit mechanism to encourage participation by religious institutions. See *supra* note 55 and accompanying text.

¹¹⁰ See *supra* notes 35, 39 and accompanying text. The plurality of *Mitchell* ties this requirement closely to its neutrality theory by concluding that if the government distributes aid neutrally, then any resulting indoctrination cannot be attributed to the government. See *supra* note 39 and accompanying text.

¹¹¹ See *supra* note 39 and accompanying text. Charitable Choice expressly states that a beneficiary's receipt of social services cannot depend on the beneficiary's religious status. See *supra* note 57 and accompanying text.

¹¹² See *supra* note 39 and accompanying text. Without this requirement, advancement of religion would occur because a financial incentive would exist to submit to religious indoctrination. See *supra* note 35 and accompanying text.

¹¹³ See *supra* notes 35, 39 and accompanying text. For example, in *Mitchell*, the program allocated aid on a per capita basis to all schools without reference to the beneficiary's religion. See *supra* note 40 and accompanying text.

and non-religious beneficiaries.¹¹⁴ In summary, the program cannot create a financial incentive to undertake, or submit to, religious indoctrination.¹¹⁵ Again, the Charitable Choice program provides a good template for future legislation by specifically stating that beneficiary status cannot depend on a person's religion or a person's active participation in a religious ceremony.¹¹⁶ Also, because the statute gives Charitable Choice beneficiaries the right to obtain aid from a secular service provider, no financial incentive to submit to even perceived indoctrination exists.¹¹⁷

3. Indoctrination

Government aid programs cannot result in indoctrination attributable to the government.¹¹⁸ With *Mitchell*, the indoctrination criterion of the effect prong became the most complex part of the Court's Establishment Clause analytical framework.¹¹⁹ Under the plurality's analysis in *Mitchell*, indoctrination may occur, but it will only result in invalidation of the aid program if the indoctrination is reasonably attributable to the government.¹²⁰ Though not directly relevant to

¹¹⁴ See *supra* notes 35, 39-40 and accompanying text. While Charitable Choice specifically excludes discrimination against beneficiaries on the basis of their religion, it permits discrimination against employees actually providing those services. See *supra* note 54 and accompanying text.

¹¹⁵ See *supra* note 35 and accompanying text. In drafting legislation, this requirement is easily met. See *supra* notes 35, 39-40, 57 and accompanying text.

¹¹⁶ See *supra* note 57 and accompanying text. The President's executive orders related to the faith-based initiative also specifically require service providers to administer aid on a nondiscriminatory basis. See *supra* note 4 and accompanying text.

¹¹⁷ See *supra* note 56 and accompanying text. Charitable Choice does not, however, require religious service providers to inform beneficiaries of their right to receive services from a secular provider. See *supra* note 56 and accompanying text.

¹¹⁸ See *supra* notes 39-40 and accompanying text. This requirement incorporates a reasonableness standard. See *supra* note 39 and accompanying text.

¹¹⁹ See *supra* notes 39-44 and accompanying text. For example, on the issues of aid in the form of cash and divertibility of aid, no single view garnered the votes of a majority of the court. See *supra* notes 40, 42 and accompanying text.

¹²⁰ See *supra* notes 39-40 and accompanying text. The plurality further concluded that a reasonable person can never attribute indoctrination to the government if the aid first passed through private hands. See *supra* notes 39-40 and

the facts of *Mitchell*, the Court discussed vouchers at length as a method of providing government aid.¹²¹ As discussed above, aid in the form of vouchers, or a mechanism similar to vouchers, allowing government funds to flow to religious institutions as a result of the choices of private individuals offers the greatest protection against indoctrination attributable to the government.¹²² A legislature should consider the following factors when drafting legislation to prevent violation of the indoctrination criterion.

(a) *Aid in the Form of Cash*

All nine Justices agree Establishment Clause violations become more probable when the government gives direct cash aid to sectarian institutions.¹²³ Charitable Choice, when eventually challenged, becomes especially vulnerable in this regard because it allows this type of direct government funding.¹²⁴ Even the conservative plurality of *Mitchell* expressed a heightened sensitivity to cash aid to sectarian institutions.¹²⁵ Any legislation allowing such a funding mechanism,

accompanying text.

¹²¹ See *supra* note 39 and accompanying text. The plurality of *Mitchell* equates a per capita aid allocation program to a voucher program. See *supra* note 40 and accompanying text.

¹²² See *supra* note 39 and accompanying text. Charitable Choice provides vouchers as a funding choice. See *supra* note 49 and accompanying text.

¹²³ See *supra* note 40 and accompanying text. The plurality and concurring opinions in *Mitchell* stated that direct cash aid presents a "special" concern, but neither contended that direct cash aid always violates the Establishment Clause. See *supra* note 40 and accompanying text.

¹²⁴ See *Sch. Dist. v. Schempp*, 374 U.S. 203, 229 (1963) (Douglas, J., concurring) (commenting that financing any institution represents most effective way to establish it); *supra* note 58. Charitable Choice attempts to address this concern by providing that cash flowing directly to religious institutions cannot fund "sectarian worship, instruction, or proselytization." See *supra* note 59 and accompanying text.

¹²⁵ See *supra* note 40 and accompanying text. For example, in *Roemer v. Bd. of Pub. Works*, the Court stated that the government violates the Establishment Clause when it provides direct aid to pay for a religious education, even though it makes this aid equally available to secular and religious educational institutions. 426 U.S. 736, 747 (1976). In another example, the Court in *Bowen v. Kendrick* stated that statutes allowing direct funding to religious institutions may not intimate that prohibitions against religious uses of the funds expire at some future time. 487 U.S. 589, 614-15 (1988). The Court in *Tilton v. Richardson* stat-

therefore, will encounter far more resistance on the Court than non-cash aid or aid in the form of vouchers.¹²⁶

(b) Aid with Religious Content

All of the Justices agree that government aid cannot contain religious content.¹²⁷ Charitable Choice provides little guidance for drafting legislation under the President's initiative in this regard because Charitable Choice contemplates either direct cash aid or some sort of voucher program.¹²⁸ The President's initiative does not define aid as narrowly, and a potential exists for legislation eventually produced by the initiative to include the provision of materials, such as books, to religious institutions.¹²⁹ Two of the goals stated by the

ed that if the statute defines the secular purpose, direct funding of religious institutions may not violate the Establishment Clause; the Court expressly denied that use of the funds for religious worship, instruction or training might be a violation. 403 U.S. 672, 679-80 (1976). In *Comm. for Pub. Educ. & Religious Liberty v. Regan*, the Court allowed direct cash payments to religious schools to pay the expenses of standardized testing. 444 U.S. 646, 657-59 (1980). The plurality in *Mitchell*, therefore, does not state that all direct funding programs violate the Establishment Clause. See *supra* note 39, 40 and accompanying text. The plurality only states the risk of the government actually advancing religion increases with direct cash aid, as opposed to some sort of indirect form of payment. See *supra* notes 39-40 and accompanying text.

¹²⁶ See *supra* note 40 and accompanying text. Note that while voucher programs may ultimately result in cash flowing directly from the government to religious institutions, voucher programs enjoy a relaxed Establishment Clause analysis because a private individual, rather than a government official, determines which institution receives the aid. See *supra* note 39 and accompanying text.

¹²⁷ See *supra* note 41 and accompanying text. In *Mitchell*, the Court found that minor violations of this requirement occurred, but the violations did not warrant invalidation of the entire program. See *supra* note 41 and accompanying text.

¹²⁸ See *supra* notes 48-49 and accompanying text. Cases involving aid to religious schools in the form of books, software and equipment provide the most salient guidance in evaluating the religious content factor. See *supra* note 38 and accompanying text.

¹²⁹ See *supra* note 92 and accompanying text. At present, the President's goals seem somewhat nebulous. See *supra* note 5 and accompanying text (describing myriad of responsibilities of Executive Department Centers for Faith-Based and Community Initiatives). For example, the Executive Department Centers for Faith-Based and Community Initiatives, as one of their responsibilities, must "coordinate a comprehensive departmental effort to incorporate faith-based and other community organizations in department programs and initiatives to the greatest extent possible." See Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 31, 2001)

President—education and reduction of the number of babies born out of wedlock—lend themselves to this type of aid.¹³⁰ Materials provided to meet these goals, therefore, should not contain any sort of religious message.

(c) *Divertibility of Aid*

Government aid easily divertible to religious activities may violate the Establishment Clause.¹³¹ For example, a Catholic church could use a computer, originally provided by the government to administer a drug treatment program, to produce pamphlets for drug addicts describing Christian notions of brotherly love and forgiveness.¹³² However, minimum safeguards against divertibility, such as (1) signed assurances of workers within the program not to use the computers for such proselytizing purposes, (2) monitoring visits by government officials and (3) labels on the computers stating they belong to a specific government program, would meet the rather low divertibility standards required by the Court.¹³³

(emphasis added).

¹³⁰ See *supra* note 92 and accompanying text. While many religions discourage pre-marital sex and thereby attempt to reduce out-of-wedlock births, the Court in *Bowen* characterized this goal as secular. *Bowen*, 487 U.S. at 580 (holding a statute's approach in dealing with adolescent sex and pregnancy may coincide with religious approaches without Establishment Clause violation); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (concluding Establishment Clause not violated merely because statute coincides with tenet of any or all religions); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (holding that legislation aimed at reducing government funding of abortion did not violate Establishment Clause simply because it coincides with tenets of Catholic Church).

¹³¹ See *supra* note 42 and accompanying text. No majority on the Court agrees on the issue of divertibility. See *supra* note 42 and accompanying text.

¹³² See *supra* note 42 and accompanying text. Justice O'Connor, in *Mitchell*, used computers as an example of a divertible item that, with adequate safeguards, does not violate the Establishment Clause. See *supra* note 42 and accompanying text.

¹³³ *Mitchell v. Helms*, 530 U.S. 793, 830 (2000). Because four Justices believed divertibility can never provide a basis for Establishment Clause violation, the only relevant divertibility inquiry for drafting legislation is the low standard articulated by Justice O'Connor. See *supra* note 42 and accompanying text.

(d) *Aid That Supplants*

Government aid funding a program administered by a religious institution may supplement non-government resources but may not supplant them.¹³⁴ Like the divertibility factor above, the standard a government program must meet in this regard is low.¹³⁵ A simple statutory requirement that administrators of a program submit a signed statement that the institution will not use government funds to supplant non-government funds should suffice to prevent invalidation of the program.¹³⁶ Charitable Choice contains no such requirement and appears vulnerable in this area.¹³⁷

(e) *Aid That is Too Substantial*

The government cannot provide aid to religious institutions that is too substantial.¹³⁸ This requirement, however, might apply only in the religious school setting because a religious school's educational mission combines the religious and secular in a way that limits the ability of any aid to appear solely to support either religious or secular interests.¹³⁹

¹³⁴ See *supra* note 43 and accompanying text. This factor does not garner much attention by the *Mitchell* plurality. See *supra* note 43 and accompanying text.

¹³⁵ See *supra* note 43 and accompanying text. This low standard results because four Justices in *Mitchell* barely admitted that it warranted consideration and two Justices held that a program meets the requirement simply by requiring signatures by program administrators that they will not utilize the government aid to supplant nongovernment aid. See *supra* note 43 and accompanying text. Whether the government aid, however, supplants aid from nongovernment sources may depend less on the actions of the administrators than that of the nongovernment donors. See *infra* note 142.

¹³⁶ See *supra* note 43 and accompanying text. Based on the make-up of the court on this issue, Justice O'Connor's standard represents the only view requiring any attention by legislators. See *supra* note 42-44 and accompanying text.

¹³⁷ See *supra* notes 45-59 and accompanying text. Justice Thomas contended that the Court has never viewed the supplement/supplant factor as a constitutionally required consideration. *Mitchell*, 530 U.S. at 815 n.7.

¹³⁸ See *supra* note 44 and accompanying text. No precise definition exists of what level of aid "is too substantial." *Mitchell*, 530 U.S. at 898 (Souter, J., dissenting) (recognizing that "too substantial" is not precise, but when present, "obviously" violates Establishment Clause).

¹³⁹ See *Wolman v. Walter*, 433 U.S. 229, 249-50 (1977) (stating primary purpose of religious schools as integrating secular and religious education); *Lemon v.*

The programs contemplated by the President's initiative and by Charitable Choice seem to lend themselves more to compartmentalization of religious and secular interests.¹⁴⁰ Still, if a small church administers a government-funded community drug treatment program comprising the vast majority of its budget, a perception may arise that the government funds the overall sectarian mission of the church.¹⁴¹

V. CONCLUSION

Justice Black in his dissent in *Board of Education v. Allen*¹⁴² expressed the belief of many Americans that government aid to religion, in any form, violates the Establishment Clause and fundamentally endangers the freedom of our republic.¹⁴³ Justice Black stated that "[t]he First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion . . . generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aid is to that extent a tyranny."¹⁴⁴ Likewise, religious groups by no

Kurtzman, 403 U.S. 602, 657 (1971) (stating religious schools inextricably intertwine secular education with their religious missions); *supra* note 44 and accompanying text.

¹⁴⁰ See *supra* notes 47, 55 and accompanying text. The Charitable Choice provision allowing for audits of only the program funds, if kept segregated from other church accounts, implies administration of these programs apart from the other church functions. See *supra* note 55 and accompanying text.

¹⁴¹ See *Agostini v. Felton*, 521 U.S. 203, 229 (1997) (refusing to adopt any precise rule on proportionality, but not refuting that aid qualifying as "too substantial" produces Establishment Clause violation).

¹⁴² 392 U.S. 236 (1968).

¹⁴³ *Allen*, 392 U.S. at 254. The government program Black found so objectionable loaned textbooks to all New York students in grades one through twelve, including students attending parochial schools. *Id.* at 238.

¹⁴⁴ *Id.* at 254. Justice Black admitted that he saw the loaning of textbooks to students attending religious schools as only a small inroad into the separation of church and state. *Id.* at 254. Justice Black then noted, however, that such a program paved the way for a variety of evils including a reduction of voluntary private contributions to religious institutions. *Id.* Black said the institutions would simply wait for government to "pick up all the bills." *Id.*; see also Segal, *supra* note 54, at 73 (stating that many, such as Art Smith of Volunteers of America, believe that government aid to religious institutions weakens need to raise funds from private sector).

means uniformly consider the President's faith-based initiative a positive development. Despite government assurances to the contrary, religious groups express fear about a variety of potential ill effects on religion that may result from partnering with the government.¹⁴⁵ In the past, the Supreme Court held the same fear. In *Lemon*, the Court stated: "[W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion"¹⁴⁶ Regardless of these legitimate fears, expressed by both secular and religious commentators, *Agostini* and *Mitchell* substantially relaxed previous restrictions on government aid to religious entities. Those two cases provide a foundation for ensuring the constitutionality of legislation similar to Charitable Choice.

Congress can create constitutionally sound legislation that recognizes the important role religious organizations play in addressing America's complex social problems. Under current Establishment Clause jurisprudence, there appears an opening for a religious message to reach the poor at the government's expense. Whether this shift in the law will serve to obliterate the separation of church and state now seems to depend less on the courts and more on the self-discipline of legislators.

Brian Craig Kimball

¹⁴⁵ See Carlson-Theis, *supra* note 6, at 676. In Texas, for example, then-Governor George W. Bush, in an effort to encourage participation in the federal Charitable Choice welfare program, gave his newly created Charitable Choice Workgroup the mission to convince religious organizations that the program would not require the secularization of their current efforts to help the poor. See Lillemor McGoldrick, Comment, *Texas and the Charitable Choice Provision of the Personal Responsibility and Work Opportunity Act of 1996*, 5 GEO. J. ON FIGHTING POVERTY 69, 70 (1997).

¹⁴⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971).

*But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external not internal controls on government would be necessary.*¹

A Short History of the Bipartisan Campaign Reform Act of 2001

I. INTRODUCTION

Efforts at campaign finance reform have captured public attention in recent years. However, these reform efforts date as far back as the American system of government itself. In 1757, George Washington, then a candidate for the House of Burgesses in the colony of Virginia, was charged with campaign violations for allegedly purchasing each voter in his district over a quart and a half of rum, wine, beer or hard cider.² William McKinley raised and spent over \$6 million on his successful campaign for the United States Presidency in 1896, which was the “most expensive campaign until after World War I.”³ Campaign finance reform in recent decades has targeted unions, corporations and wealthy individual donors. Often, political scandals serve as the impetus for reform.

This comment will trace the history of the issue of campaign finance reform, from the restrictions on labor union political expenditures in 1947’s Taft-Hartley Act, to the monetary caps on expenditures of 1971’s Federal Election Campaign Act later struck down by the Supreme Court, continuing through Senator David Boren’s unsuccessful attempts at campaign finance reform in the 1980s. It will focus on the procedural problems each set of reforms encountered, whether within Congress or in the judicial or executive branches of govern-

¹ THE FEDERALIST NO. 51, at 356 (James Madison) (Clinton Rossiter ed., 1961).

² DOLLAR POLITICS 3 (Nancy Lammers ed., 1982).

³ GEORGE THAYER, WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN PRACTICES FROM 1789 TO THE PRESENT 50 (1974).

ment. Finally, this comment will examine the components of the Bipartisan Campaign Reform Act of 2001 (McCain-Feingold or Senate Bill 27), concentrating on specific and concrete changes that can be made both to increase the Act's likelihood of passage and decrease the probability of subsequent judicial challenges.

II. SECTION 304 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 (TAFT-HARTLEY ACT)

The Taft-Hartley Act, or the Labor Management Relations Act of 1947, was passed in part "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare."⁴ One of the most controversial provisions of the Taft-Hartley Act was section 304, a provision that amended section 313 of the Federal Corrupt Practices Act of 1925.⁵ Section 304 made it unlawful for any labor organization to "make a contribution or expenditure in connection with [federal elections]" or for candidates to receive such contributions.⁶ A bill without the prohibition on union expenditures for political purposes was introduced in the Senate.⁷ A bill permitting union political expenditures, as long as they were approved by union vote, was introduced in the House but was not adopted.⁸

President Harry S. Truman vehemently opposed passage of the Act and vetoed House Bill 3020 on June 20, 1947, call-

⁴ Labor Management Relations (Taft-Hartley) Act § 1, 29 U.S.C. § 141 (1994). The Act states neither employers, employees nor labor organizations have the right to "jeopardize the public health, safety, or interest." *Id.*

⁵ Taft-Hartley Act, ch. 120, sec. 304, § 313, 61 Stat. 136, 159-60 (1947) (repealed 1976). The earlier Act regulated labor union contributions in connection with political office. Federal Corrupt Practices Act of 1925, ch. 368, § 313, 43 Stat. 1070, 1074 (repealed 1948). The Taft-Hartley Act amended this section, prohibiting certain expenditures, as well as contributions. Sec. 304, 61 Stat. at 159-60. The Act also included primaries, conventions and caucuses for the definition of "election to political office." *Id.*

⁶ Sec. 304, 61 Stat. at 159-60.

⁷ S. 1613, 80th Cong. (1947). However, the House version of the bill that included the prohibition was later adopted. H.R. 3020, 80th Cong. (1947) (passing over Truman's veto to become Taft-Hartley).

⁸ H.R. 4193, 80th Cong. (1948).

ing the bill "a clear threat to the successful working of our democratic society."⁹ He specifically addressed the restriction placed on labor union political activity, calling the provision "a dangerous intrusion on free speech, unwarranted by any demonstration of need, and quite foreign to the stated purposes of this bill."¹⁰ Scholars began predicting the demise of section 304 shortly after the passage of the Act.¹¹

The Supreme Court examined section 304 of the Taft-Hartley Act, the prohibition on union political expenditures in conjunction with campaigns, in *United States v. CIO*.¹² The case involved an issue of a labor union publication, *CIO News*, in which the president of the union issued a front-page statement encouraging members to vote for a candidate in a congressional special election.¹³ The statement of the union president also declared that section 304 of the Taft-Hartley Act was unconstitutional because it interfered with constitutionally guaranteed freedoms of speech, press and assembly.¹⁴ In its decision, the Court examined the legislative history of the Labor Management Relations Act of 1947 and struggled to find precise definitions of the terms "contributions" and "expenditures."¹⁵ The Court concluded that the term "expendi-

⁹ 93 CONG. REC. 7488 (1947).

¹⁰ *Id.* President Truman said House Bill 3020 "contains the seeds of discord which would plague this nation for years to come." *Id.* at 7485. The House voted successfully to override the Presidential veto, 331-83. *Id.* at 7489.

¹¹ See Arthur E. Sutherland, Jr., *The Constitutionality of the Taft-Hartley Law*, 1 INDUS. & LAB. REL. REV. 177, 183 (1948) (finding "most conspicuous" vulnerability of Taft-Hartley Act in Federal Corrupt Practices amendments [section 304]); John E. Cosgrove, Note, *Labor Law-Comment on the Taft-Hartley Act, Title I*, 23 NOTRE DAME LAW. 238, 251 (1948) (predicting "[s]ome of the Act's provisions [section 304, prohibiting certain union political expenditures] will almost certainly be declared unconstitutional"); see also *Bowe v. Sec'y of the Commonwealth*, 69 N.E.2d 115, 131 (Mass. 1946) (striking down as unconstitutional proposed state law similar to section 304 of Taft-Hartley Act).

¹² 335 U.S. 106 (1948).

¹³ *CIO*, 335 U.S. at 108.

¹⁴ *Id.* at 122.

¹⁵ *Id.*; see Thomas F. Broden, Note, *Labor Law-Comment on the Taft-Hartley Act, Title III*, 23 NOTRE DAME LAW. 561, 566-67 (1948) (asserting section 304 abridged public's right to access political debate through press). However, the Supreme Court held that section 313 of the Corrupt Practices Act (which section 304 of the Taft-Hartley Act amended) did not reach "such a use of corporate

ture" had been added for clarification purposes, not to "extend greatly the coverage of the section," and that Congress had not intended the amended version of the Federal Corrupt Practices Act of 1925, as it appeared in the Taft-Hartley Act, to apply to such union activities.¹⁶ In a thoughtful opinion concurring in the result only, Justice Rutledge slammed the Court for "invasion of the statute by rewriting [and] emasculating the statute."¹⁷ The concurring Justices found the language of the statute "sweepingly comprehensive."¹⁸ They criticized the statute, had it applied to the facts at issue, as "a prior restraint . . . [that] cannot be squared with the First Amendment."¹⁹ In a particularly prescient commentary, the concurring Justices remarked that the publication of a group's political views in this particular manner "is and always has been an integral part of our democratic electoral and legislative processes."²⁰ They concluded that this law, had it applied in this particular situation, would have had the effect of depriving the author or speaker and the citizenry of "free and full discussion and the right of assembly for that purpose."²¹ The specific part of the statute involved in *CIO* was never repealed.²² However, in October, 2000, it was found unconstitutional as applied to a non-profit pro-life corporation.²³

In the decades that followed the Taft-Hartley Act, the rising popularity of radio and television drastically changed the landscape of American political elections and caused the

or labor organization funds" and declined to rule directly on the constitutionality of section 304. *CIO*, 335 U.S. at 123-24.

¹⁶ *CIO*, 335 U.S. at 123-24. The district court had dismissed the case on the grounds that section 304 was unconstitutional. *United States v. CIO*, 77 F. Supp. 355, 359 (D.D.C.), *aff'd*, 335 U.S. 106 (1948).

¹⁷ *CIO*, 335 U.S. at 124 (Rutledge, J., concurring).

¹⁸ *Id.* at 132.

¹⁹ *Id.* at 155.

²⁰ *Id.* at 143.

²¹ *Id.* at 144.

²² Current law retains a similar restriction on contributions *and* expenditures. See 2 U.S.C. § 441b(a) (2000).

²³ See *Beaumont v. Fed. Election Comm'n*, 137 F. Supp. 2d 648, 658 (E.D.N.C. 2000) (holding pro-life corporation established right to make independent expenditures and contributions, but reserving judgment on whether 2 U.S.C. § 441b is unconstitutional on its face), *aff'd*, 278 F.3d 261 (4th Cir. 2002).

costs of campaigning to increase exponentially.²⁴ United States campaign spending doubled between 1956 and 1968, from an estimated \$155 million to \$300 million.²⁵ United States campaign media spending, by comparison, grew from an estimated \$10 million to \$60 million during those years.²⁶ In 1971, in the face of skyrocketing campaign costs, Congress passed the Federal Election Campaign Act (FECA) and the Presidential Election Campaign Fund Act.²⁷

President Richard Nixon signed the bills into law, but his 1972 Presidential election was tarnished by large illegal and undisclosed contributions from corporations, labor unions and wealthy individuals.²⁸ For example, President Nixon allegedly raised dairy price supports in March, 1971 (after the Secretary of Agriculture's announcement that such an increase was unwarranted) as part of a quid pro quo agreement where dairy farmers made campaign donations of \$10,000 and \$25,000 and pledged \$2 million in future campaign support.²⁹ These egregious violations of existing campaign finance laws clearly demonstrated the need for substantive change.

III. PUBLIC FINANCING OF FEDERAL ELECTIONS: A NOVEL IDEA?

Public financing of presidential elections was first established through the Presidential Election Campaign Fund Act

²⁴ DOLLAR POLITICS, *supra* note 2, at 8.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Presidential Election Campaign Fund Act § 801, I.R.C. § 9001 (1994). The Presidential Election Campaign Fund allows taxpayers to designate an amount of their tax liability to be paid to the Presidential Election Campaign Fund, which made funds available to Presidential candidates, provided certain records are provided and other conditions are met. *Id.*

²⁸ See generally HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION (1976).

²⁹ *Id.* at 489-91. The FBI traced cash found on the Watergate burglars in 1972 to a Finance Committee to Re-elect the President. *Id.* at 460-61. The donation came from a Houston, Texas, oil corporation and had been "laundered" by a Mexico City attorney. *Id.* Some members of the corporation were associated with Root and Brown, Inc., Texas Eastern Transmission Co., and Tenneco; these firms were awarded a \$1 billion contract to export natural gas from the U.S.S.R. to the United States. *Id.*

of 1971,³⁰ although the idea had been proposed by Congress in 1966 and originally suggested by President Theodore Roosevelt in his 1907 State of the Union address.³¹ The Presidential Election Campaign Fund Act allows taxpayers to check a box on their income tax return and voluntarily contribute three dollars to the Presidential Election Campaign Fund.³² Candidates must meet a medley of criteria to be eligible for federal funds, such as furnishing requested records to the Federal Election Commission (FEC), certifying that any campaign television commercials will be closed-captioned or otherwise accessible to the deaf and hearing-impaired and agreeing to spend only \$50,000 of personal and "immediate family" funds on the campaign.³³ In 1974, amendments to the Federal Election Campaign established the FEC,³⁴ increased coverage of presidential nominating conventions³⁵ and created coverage for presidential primaries.³⁶

Some scholars criticize systems of public funding for elections as fundamentally imbalanced, since incumbents receive benefits including mailing privileges, staff resources and additional media coverage, all of which arguably place challengers at a significant disadvantage.³⁷ Other scholars have proposed a voucher system as an additional method of public financing of Congressional elections.³⁸ However, voucher proposals

³⁰ See *supra* note 27 and accompanying text.

³¹ FED. ELECTION COMM'N, PUBLIC FUNDING OF PRESIDENTIAL ELECTIONS (Aug. 1996), available at <http://www.fec.gov/pages/pubfund.htm#anchor686308> (last visited April 9, 2002). President Roosevelt also advocated banning private contributions in his 1907 address. *Id.*

³² *Id.* Individuals may contribute three dollars, and taxpayers filing a joint return may contribute six dollars. The individual contribution amount was raised from one to three dollars in 1993. *Id.*

³³ I.R.C. §§ 9003-9004 (1994).

³⁴ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 208, § 310, 88 Stat. 1272, 1280-82 (currently codified as amended at 2 U.S.C. § 437c (2000)).

³⁵ *Id.* § 406(a) (currently codified as amended at I.R.C. § 9008 (1994)).

³⁶ Presidential Primary Matching Payment Account Act, Pub. L. No. 93-443, § 408(c) (1974) (currently codified as amended at I.R.C. § 9035 (1994)).

³⁷ Stephen E. Gottlieb, *The Dilemma of Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 223-24 (1989).

³⁸ See Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: The Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126,

have been criticized as unrealistically discounting the potential for corruption.³⁹

IV. THE FEDERAL ELECTION CAMPAIGN ACT OF 1974: THE CONTINUING SAGA

In *Buckley v. Valeo*,⁴⁰ the Supreme Court addressed the constitutionality of several 1974 amendments to the Federal Election Campaign Act (FECA), specifically the ceiling on individual contributions and expenditures by individuals and groups.⁴¹ These restrictions contained the following key provisions:

- (a) individual political contributions are limited to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to \$1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits;
- (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed;
- (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code; and
- (d) a Federal Election Commission is established to administer and enforce the legislation.⁴²

In the court of appeals, the contribution, expenditure and disclosure requirements survived constitutional scrutiny because that court determined that protecting the integrity of the

1150 (1994) (proposing system similar to public financing system for Presidential elections, where candidates agreeing to comply with limits on overall spending would receive public funds to be used for media expenses, including television, advertising and mailings).

³⁹ Gottlieb, *supra* note 37, at 255.

⁴⁰ 424 U.S. 1 (1976).

⁴¹ *Buckley*, 424 U.S. at 26.

⁴² *Id.* at 7 (footnote omitted). Coordinated expenditures with a specific candidate or her campaign are considered contributions for the Act's purposes. *Id.* at 46.

electoral system was a "clear and compelling interest."⁴³ The appellants argued that restrictions on funds used for political expression violated the First Amendment, especially considering that so many significant methods of political expression involve spending money.⁴⁴ The Supreme Court rejected the court of appeal's analysis of the facts under the framework adopted in *United States v. O'Brien*,⁴⁵ explaining that the act of spending money "simply cannot be equated" with burning a draft card.⁴⁶ Even if the *O'Brien* analysis had been appropriate, the Court found that the Act involved "suppressing communication" and thus would have failed under that analysis.⁴⁷ The Court further rejected the argument that limitations on contributions and expenditures acted as nondiscriminatory "reasonable time, place and manner" restrictions.⁴⁸ The Court quipped that freedom of political expression restricted only by a limitation on expenditures "is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."⁴⁹

The Court held that expenditure limitations were a "substantial" restraint on speech and noted that the limitations virtually barred the general public from many efficient means of communication.⁵⁰ However, the Court recognized that be-

⁴³ *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975), *aff'd*, 424 U.S. 1 (1976).

⁴⁴ *Buckley*, 424 U.S. at 11. The appellants also asserted that disclosure requirements in the amendments to the Federal Election Campaign Act violated their First Amendment associational freedoms. *Id.*

⁴⁵ 391 U.S. 367, 377 (1975)

⁴⁶ *Buckley*, 424 U.S. at 16. In *O'Brien*, the Court sustained a young man's conviction for burning his draft card during the height of the Vietnam conflict, holding such restrictions are constitutional where the government regulation falls "within the constitutional power of the government," "furthers an important or substantial government interest" that is unrelated to the suppression of freedom of expression and interferes with First Amendment rights only as much as necessary. *O'Brien*, 391 U.S. at 377.

⁴⁷ *Buckley*, 424 U.S. at 17.

⁴⁸ *Id.* at 17-18. For example, regulating (not prohibiting) the noise level of sound trucks broadcasting in public places is considered a reasonable time, place and manner restriction. See *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding restrictions on noise level emitted by sound trucks).

⁴⁹ *Buckley*, 424 U.S. at 19 n.18.

⁵⁰ *Id.* at 19-20.

cause contributions are more general supports, rather than specific messages, the contribution limitations "involve[] little direct restraint on . . . political communication."⁵¹ To support this assertion, the Court pointed to statistical findings in the record showing that in the 1974 election cycle, only 5.1% of total funds raised came from contributions over \$1000.⁵² Addressing the argument that the contribution and expenditure limitation interfered with First Amendment associational rights, the Court found that contribution limitations *did* interfere with the associational rights of contributors but did not prevent contributors from becoming involved with campaign efforts in other ways (for example, by volunteering to work for the campaign).⁵³ The Court nevertheless recognized that expenditure limitations place constraints on the associational rights of both the political organization and its members.⁵⁴ In contrast, however, the Supreme Court determined in *United States v. CIO* that amending a statute to include contributions and expenditures was a clarification only and was not intended as a significant expansion of the scope of the statute.⁵⁵

Appellants argued that the qualifications that organizations must meet to qualify for higher contribution limits served to unconstitutionally limit their freedom of association. However, the Court found that the requirements actually improve the opportunities of legitimate groups to take part in the electoral process, since those "shell" organizations created simply to dodge contribution limitations are filtered out of the process.⁵⁶

⁵¹ *Id.* at 21.

⁵² *Id.* at 21 n.23.

⁵³ *Id.* at 22.

⁵⁴ *Buckley*, 424 U.S. at 22.

⁵⁵ See *supra* notes 12-21 and accompanying text.

⁵⁶ *Buckley*, 424 U.S. at 35-36. The First Amendment to the United States Constitution protects "the right of the people peaceably to assemble" but does not explicitly mention a right of expressive association. U.S. CONST. amend. I. However, in 1958, the Supreme Court interpreted the First Amendment to include a protected right to freedom of association, in order to ensure "effective advocacy" of unpopular viewpoints. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The Court explained that group association strengthened "effective advocacy" of public and private views and pointed to the well-supported "close nexus" between freedom of speech and freedom of assembly. *Patterson*, 357 U.S. at 460. The Court stated freedom of association "for advancement of beliefs and ideas" is

Since the Court found the \$1000 contribution limitations per candidate acceptable, the \$25,000 contribution limitations per donor per year were also found constitutional.⁵⁷ Since the expenditure limitations controlled activities of the general public as well as political parties and candidates, the Court reasoned that while this limitation was neutral on its face, it limited political expression at the heart of First Amendment protections.⁵⁸

Appellants argued the expenditure limitation was unconstitutionally vague because they felt that criminal penalties could be imposed under a statute so vaguely worded that a reasonable person would not know whether he or she was in compliance with the law.⁵⁹ The statute states "any expenditure . . . relative to a clearly identified candidate" shall be limited.⁶⁰ The terms "expenditure," "clearly identified" and "candidate" are identified in the statute, but the term "relative to" is not.⁶¹ Based on the legislative history and the district court opinion, the Supreme Court found that the phrase "relative to" in context "permits, if indeed it does not require" reading the phrase as "advocating the election or defeat of" a candidate.⁶²

While this linguistic dissection of statutory language appeared incredibly complicated, the Court's analysis in this area would shape the next several decades of debate on the permissible scope of new campaign finance reform legislation. Because the distinction between general discussion, more concrete advocacy and direct solicitation depends in part on the listener's interpretation and inference, the Court reasoned the statute must be limited to "explicit words of advocacy of election or defeat of a candidate" to avoid constitutional difficulties with vagueness.⁶³ The Court held that it must be interpreted only

encompassed by the liberty provision of the Fourteenth Amendment, which includes freedom of speech. *Id.*

⁵⁷ *Buckley*, 424 U.S. at 38.

⁵⁸ *Id.* at 39.

⁵⁹ *Id.* at 40.

⁶⁰ *Id.* at 41.

⁶¹ *Id.*

⁶² *Buckley*, 424 U.S. at 42.

⁶³ *Id.* at 43

to apply to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."⁶⁴

Applying "exacting scrutiny," the Court determined the government interest and purpose of the monetary caps was to prevent corruption, and this interest was of sufficient weight to justify monetary caps on contributions, but not monetary caps on expenditures.⁶⁵ The court of appeals pointed to the several specific examples of corruption in the 1972 election, including "huge contributions from the dairy industry, a number of corporations (illegally) and ambassadors and potential ambassadors" and called the 1972 elections "a watershed for public confidence in the electoral system."⁶⁶ The Supreme Court noted that these examples "demonstrate that the problem [of corruption] is not an illusory one."⁶⁷

The FEC later attempted to expand the definition of "express advocacy" the Supreme Court provided in *Buckley* by including communications that could "only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s),"⁶⁸ but

⁶⁴ *Id.* at 44. The Court then dropped the now-infamous footnote fifty-two, stating that their interpretation limits the application of the statute to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id.* at 44 n.52.

⁶⁵ *Id.* at 26. The goal of the monetary caps was to prevent corruption "and [the] appearance of corruption resulting from large individual financial contributions" and the effect those contributions might have on candidates. *Id.* The Court also noted the Act's provisions for compelled disclosure were not warranted by simply demonstrating a legitimate government interest. *Id.* at 64. The interests served by disclosure include informing the electorate, discouraging corruption and its appearance, and facilitating compliance and enforcement with contribution limits. *Id.* at 66-68.

⁶⁶ *Buckley v. Valeo*, 519 F.2d 821, 839-40 (D.C. Cir. 1975), *aff'd*, 424 U.S. 1 (1976).

⁶⁷ *Buckley*, 424 U.S. at 27.

⁶⁸ 11 C.F.R. § 100.22 (2000). Part (a) defined "express advocacy" in terms drawn from the *Buckley* footnote, such as "cast your vote for Smith," "elect Brown," or "defeat Myers." *See id.* § 100.22(a); *see also Buckley*, 424 U.S. at 44 n.52. Part (b), however, significantly expanded the scope of the regulation, also restricting communications based on a "reasonable person" standard:

(b) When taken as a whole and with limited reference to external events,

courts refused to enforce this broader rule.⁶⁹ The *Buckley* Court indicated that restrictions on campaign contributions would be given lower scrutiny than restrictions on expenditures. The *Buckley* Court did not make this point explicitly, but later specifically stated that campaign contribution limitations would receive lower scrutiny than similar limitations on expenditures.⁷⁰

V. THE FAILED REFORM ATTEMPTS OF THE 1980s

Before America adopted Arizona Senator John McCain as the national voice for campaign finance reform, Oklahoma Senator David Boren had worked for years to pass substantive congressional campaign finance reform. Senator Boren introduced his first version, Senate Bill 1806, in October, 1985 in the 99th Congress.⁷¹ Senate Bill 2 was introduced in the 100th Congress.⁷² Senate Bill 137 was introduced in the 101st Con-

such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b). Under these new guidelines, "electioneering" regarding a candidate's "character, qualifications, or accomplishments" is deemed express advocacy if, "in context, [it has] no other reasonable meaning than to encourage actions to elect or defeat the candidate in question. . . . [T]he timing of the communication would be considered on a case-by-case basis." Express Advocacy; Independent Expenditures; Corporate Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (to be codified at 11 C.F.R. pts. 100, 106, 109, 114).

⁶⁹ See generally *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996).

⁷⁰ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986); see *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 494-95 (1985) (reaffirming "speech by proxy" doctrine of *California Medical*, but distinguishing PAC expenditure limits as unconstitutional under *Buckley*); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (differentiating between "speech by proxy" through contributions and political advocacy given full First Amendment protection under *Buckley*).

⁷¹ Campaign Finance Reform Act of 1985, S. 1806, 99th Cong. This proposal increased individual contribution limitations to candidates and their political committees and lowered contribution limitations for "multicandidate political committee" contributions to other political committees.

⁷² Senatorial Election Campaign Act of 1987, S. 2, 100th Cong. This bill pro-

gress.⁷³ All of these bills were ultimately unsuccessful. Only Senate Bill 137 passed in the House of Representatives, but President George H.W. Bush later vetoed it.⁷⁴ Senate Bill 1806, the Campaign Finance Reform Act of 1985, would have increased the individual contribution limitations to political candidates and their committees and lowered the amounts that a political committee could contribute to another political committee.⁷⁵ Although Senate Bill 2, the campaign finance reform bill Senator Boren introduced during the 100th Congress, was ultimately unsuccessful, the story of the bill offers a fascinating insight into some of the Senate's more obscure procedural tools.

During debate, after several unsuccessful attempts at a quorum call, Senate Majority Leader Robert Byrd made a motion to "compel the attendance" of absent senators.⁷⁶ The United States Constitution provides that "Each House . . . may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."⁷⁷ The Senate voted to have United States Senate Sergeant-at-Arms Henry Giugni arrest absent Senators under a Senate rule allowing the Senate Sergeant-at-Arms to "compel the attendance" of absent senators.⁷⁸

Historically, arrest motions as a tool to compel reluctant or recalcitrant senators to attend sessions had not been used since 1950 and 1976. In those two cases, the threat of arrest alone was sufficient to bring the absent members to the floor.⁷⁹ However, senators have not actually been arrested under such a motion since 1942.⁸⁰

posed a "voluntary system" of public financing and expenditure limitations.

⁷³ Senatorial Election Campaign Act of 1989, S. 137, 101st Cong. Similar to Senate Bill 2, this bill included voluntary expenditure limitations and some public financing.

⁷⁴ See *infra* notes 83-84 and accompanying text.

⁷⁵ S. 1806.

⁷⁶ GREG D. KUBIAK, *THE GILDED DOME: THE UNITED STATES SENATE AND CAMPAIGN FINANCE REFORM* 193 (1994). The word "compel" had been interpreted previously to include "arrest." *Id.*

⁷⁷ U.S. CONST. art. I, § 5.

⁷⁸ KUBIAK, *supra* note 76, at 194.

⁷⁹ *Id.*

⁸⁰ Helen Dewar, *Midnight Manhunt in the Senate: 'Banana Republic' Dragnet*

In 1988, Senator Bob Packwood of Oregon was taken into custody under the warrant issued for his arrest, and Capitol Police officers were forced to carry him into the Senate chambers.⁸¹ Senator Packwood had locked himself in his office and barricaded the door when he received the news that the Sergeant-at-Arms and five armed Capitol Police officers had a warrant for his arrest.⁸²

Senator Boren was finally successful in sponsoring a bill that passed the House and the Senate in 1992, but the bill was vetoed by President George H.W. Bush on May 9, 1992.⁸³ Upon vetoing Senate Bill 137, the first comprehensive campaign finance reform bill to pass both chambers of Congress in more than a decade, President Bush called it a "taxpayer-financed incumbent protection plan,"⁸⁴ echoing concerns scholars had also expressed over the wisdom of increased public funding for congressional elections.⁸⁵

VI. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2001: SENATOR MCCAIN'S UPHILL BATTLE

The calls for substantive campaign finance reform have recently strengthened in the wake of questionable political fundraising activities of President Bill Clinton and Vice President Al Gore during the 1996 election cycle.⁸⁶ President Bill

Hit After Packwood's Arrest Filibuster, WASH. POST, Feb. 25, 1988, at A1, available at 1988 WL 2070257.

⁸¹ *Id.*

⁸² *Id.*

⁸³ John E. Yang, *Bush Vetoes Campaign Funding Bill: Measure Dismissed as 'Taxpayer-Financed Incumbent Protection Plan'*, WASH. POST, May 10, 1992, at A7, available at 1992 WL 2188829.

⁸⁴ *Id.*

⁸⁵ See *supra* notes 30-39 and accompanying text for a complete discussion of scholarly criticism of public funding of congressional races.

⁸⁶ Maureen Dowd, *Tin Cup Couple*, N.Y. TIMES, Sept. 24, 2000, at A20. Dowd sniped, "The Clintons may as well have listed the Lincoln Bedroom on eBay." *Id.* In 1997, Vice President Al Gore received scathing criticism for his placement of political fundraising calls from the Vice President's office. See John F. Harris & Charles R. Babcock, *Gore's Calls for DNC from Office Detailed: At Least 46 Possible Donors Were Reached*, WASH. POST, Aug. 27, 1997, at A1, available at 1997 WL 12883387. When Gore was asked if, in retrospect, he had made mistakes with the 1996 fundraising, he responded: "No . . . I understood what I did to be

Clinton and First Lady Hillary Rodham Clinton were bashed by the media for housing a steady stream of "friends and supporters" (who donated considerable sums to Clinton's 1996 presidential campaign) in the Lincoln Bedroom of the White House.⁸⁷ Efforts at substantive campaign finance reform have failed repeatedly in recent years.⁸⁸

The Supreme Court has most recently reexamined the application and consequences of the 1976 *Buckley* decision in *Nixon v. Shrink Missouri Government PAC*.⁸⁹ In this case, the Shrink Missouri Government PAC challenged the application of Missouri's campaign finance statute under the First and Fourteenth Amendments.⁹⁰ The statute limited campaign contributions to a range of \$250 to \$1000, depending on the office or number of constituents.⁹¹ The Court rejected the proposition that the *Buckley* limits were a "minimum constitutional threshold" and held that the Missouri limits were not so low that they "render[ed] contributions pointless."⁹²

Justices Breyer and Ginsburg expressed some doubts over whether *Buckley* provided the Legislature with enough flexibility to address the problem of campaign finance. Justice Breyer opined that *Buckley* "might be interpreted as embodying sufficient flexibility for the problem at hand. . . . *Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating . . . 'soft money.'"⁹³ He continued, however, with a moment of hesitation: "But what if I am wrong about *Buckley*? Suppose *Buckley* denies the political branches suffi-

legal and appropriate. I felt like I was doing the right thing." Ceci Connolly, *Gore in a Bind on Campaign Finance Issue: Reform Message Clashes with Fundraising Race*, WASH. POST, Mar. 18, 2000, at A1 (alteration in original), available at 2000 WL 2291729.

⁸⁷ See Peter Baker & Susan Schmidt, *President Had Big Role in Setting Donor Perks: Records Detail Close Involvement with Fund-Raising*, WASH. POST, Feb. 26, 1997, at A1, available at 1997 WL 9336790; Dan Balz & Lou Cannon, *Under Clinton, Old Practices on a New Scale*, WASH. POST, Mar. 3, 1997, at A1, available at 1997 WL 9337647.

⁸⁸ See *supra* notes 71-85 and accompanying text.

⁸⁹ 528 U.S. 377 (2000).

⁹⁰ *Shrink Mo. Gov't PAC*, 528 U.S. at 383.

⁹¹ *Id.*

⁹² *Id.* at 396-97.

⁹³ *Id.* at 404 (Breyer, J., concurring).

cient leeway to enact comprehensive solutions to the problems posed by campaign finance. If so . . . I believe the Constitution would require us to reconsider *Buckley*.⁹⁴

The hesitation of four out of the nine Supreme Court Justices to reaffirm the framework set out in *Buckley* may suggest that the Supreme Court would approach judicial review of current campaign finance reform proposals differently. Justices Breyer and Ginsburg provide the most hopeful indication for proponents of current substantive campaign finance reforms by expressing their willingness to reconsider *Buckley* if a party could demonstrate substantive reform was impossible within the contexts of that decision. Although only Justice Ginsburg joined the Breyer concurrence, this indicates at least some members of the Court may be willing to accord legislators like former Senator David Boren and Senator John McCain additional flexibility, possibly even beyond the confines of *Buckley*, in tackling the problems of campaign finance reform.

Reform advocates differ on the exact source of the campaign finance dilemma; some assert "soft money" is the root of the problem, while others insist independent expenditures and issue advertising are responsible.⁹⁵ Senators John McCain, Russell Feingold and Thad Cochran (a former opponent of such reforms) are again working "to amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign finance reform."⁹⁶

McCain's Bipartisan Campaign Reform Act of 2001 contains five substantive provisions. First, the Act eliminates the

⁹⁴ *Id.* at 405. However, Justices Thomas and Scalia urged the Court to explicitly overrule *Buckley*. *Id.* at 410 (Thomas, J., dissenting). Justice Thomas asserted that contribution limitations should receive strict scrutiny since they work a "direct and substantial" limitation on First Amendment activity. *Id.*

⁹⁵ See David S. Broder, *Bush and the Threat to Soft Money Reform*, WASH. POST, March 11, 2001, at B7, available at 2001 WL 2550486. Glenn J. Moramarco, senior attorney at the Brennan Center for Justice at the New York University School of Law, has proposed a system of self-disclosure, whereby ads designated by their sponsors as "electioneering" would be governed by "all of the restrictions permitted by the Supreme Court." Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 CATH. U. L. REV. 107, 127 (1999).

⁹⁶ Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong.

soft money loophole and increases the contribution limits for individuals and state political parties, raising individual contribution limitations on contributions to state political parties from \$25,000 to \$30,000 and increasing the contribution limitations affecting state branches of political parties.⁹⁷ The contribution limitations have not been changed since the Supreme Court handed down *Buckley* in 1974. Under the Bipartisan Campaign Reform Act of 2001, state committees of political parties will be able to contribute up to \$10,000 per calendar year, and the aggregate contribution limit for individuals has been raised to \$30,000.⁹⁸ Second, the Act requires parties making "electioneering communications" to file a disclosure statement with the FEC Commissioner.⁹⁹ "Electioneering communications" are communications made in close proximity to the date of an election containing a reference to a "clearly identified" candidate for office.¹⁰⁰ Labor and corporate disbursements for electioneering communications are also prohibited.¹⁰¹ Third, the Act further clarifies the distinction between independent and coordinated expenditures.¹⁰² Fourth, the Act specifically prohibits solicitation or receipt of donations from a party "located in a room or building occupied in the discharge of official duties by an officer or employee of the United States."¹⁰³ This section appears to be a direct response to fundraising activities conducted from the White House by for-

⁹⁷ *Id.* § 101.

⁹⁸ *Id.*

⁹⁹ *Id.* § 201.

¹⁰⁰ *Id.*

¹⁰¹ S. 27 § 203. The AFL-CIO, the largest labor union in the United States and a steadfast Democratic Party supporter, recently announced its opposition to any campaign finance reforms that would interfere with its ability to communicate with its membership on important issues, including communications of a political nature before elections. Eliza Newlin Carney, *Feuding Reformers*, NAT'L J., Mar. 17, 2001, available at 2001 WL 7181862, at *3. Ninety-eight percent of labor union soft money contributions made during the 1999-2000 election cycle went to the Democratic Party. *Id.*

¹⁰² S. 27 §§ 211-14. Coordinated expenditures, as defined in the Act, include any payments made by employees, fundraisers, agents of the candidate and those who have participated in discussion of "campaign strategy and tactics" with the candidate, committee or coordinated political party. *Id.* § 214.

¹⁰³ *Id.* § 302.

mer President Bill Clinton and First Lady Hillary Rodham Clinton, now a Democratic Senator from New York. The provision would also prevent the Vice President from making fundraising calls from his office, as Al Gore did in 1996.¹⁰⁴ Finally, the Act strengthens the prohibition against foreign money campaign contributions in federal elections and contains a severability clause providing that the remaining provisions of the Act shall remain in force if one or more sections of the Act are found unconstitutional.¹⁰⁵

Eighteen senators sponsored the Bipartisan Campaign Reform Act of 2001 upon introduction, including John McCain and Thad Cochran.¹⁰⁶ One hundred and forty-eight Representatives sponsored the House version of the Bipartisan Campaign Reform Act of 2001, also known as the Shays-Meehan proposal, upon its introduction.¹⁰⁷ The House version of the campaign finance reform proposal also specifically restricts the use of Air Force One and contains a prohibition on the use of

¹⁰⁴ See *supra* note 86 and accompanying text for a fuller discussion of the 1996 fundraising problems.

¹⁰⁵ S. 27 §§ 303, 401.

¹⁰⁶ S. 27. Other senators continue to be named co-sponsors of the Act. See 147 CONG. REC. S2388-03 (daily ed. Mar. 15, 2001) (adding Senator Graham, D-FL, as co-sponsor); 147 CONG. REC. 2071-02 (daily ed. Mar. 8, 2001) (adding Senator Edwards, D-NC, as co-sponsor); 147 CONG. REC. S1617 (daily ed. Feb. 27, 2001) (adding Senator Miller, D-GA, and Senator Clinton, D-NY, as co-sponsors); 147 CONG. REC. S1228 (daily ed. Feb. 8, 2001) (adding Senator Johnson, D-SD, Senator Leahy, D-VT, Senator Sarbanes, D-MD, and Senator Reid, D-NV); 147 CONG. REC. S785 (daily ed. Jan. 30, 2001) (adding Senator Carnahan, D-MO, Senator Bingaman, D-NM, and Senator Bayh, D-IN, as co-sponsors); 147 CONG. REC. S587 (daily ed. Jan. 25, 2001) (adding Senator Lincoln, D-AR, as co-sponsor); 147 CONG. REC. S552 (daily ed. Jan. 24, 2001) (adding Senator Feinstein, D-CA, Senator Mikulski, D-MD, and Senator Carper, D-DE, as co-sponsors); 147 CONG. REC. S498 (daily ed. Jan. 23, 2001) (adding Senator Cleland, D-GA, and Senator Nelson, D-FL, as co-sponsors). Senate co-sponsors now total forty-one.

¹⁰⁷ Bipartisan Campaign Reform (Shays-Meehan) Act of 2001, H.R. 380, 107th Cong. Other Representatives continue to be named co-sponsors of the Act. See 147 CONG. REC. H623-02 (daily ed. Mar. 1, 2001) (adding Representative Matheson, D-UT, as co-sponsor); 147 CONG. REC. H443-02 (daily ed. Feb. 27, 2001) (adding Representative Mascara, D-PA, and Representative Lucas, R-OK, as co-sponsors); 147 CONG. REC. H324-02 (daily ed. Feb. 13, 2001) (adding Representative T. Hall, D-OH, as co-sponsor); 147 CONG. REC. H223-03 (daily ed. Feb. 7, 2001) (adding Representative Boyd, D-FL, Representative Boswell, D-IA, Representative Olver, D-MA, Representative Etheridge, D-NC, Representative Hinojosa, D-TX, and Representative Thurman, D-FL, as co-sponsors). House co-sponsors now total 157.

White House "meals and accommodations for political fundraising."¹⁰⁸ This provision appears to be a direct response to former First Lady Hillary Rodham Clinton's extensive travel on Air Force One and other military aircraft during her successful campaign for a New York Senate seat.¹⁰⁹ House Republicans calculated the total cost of Mrs. Clinton's travel to be over \$182,000, approximately eighty percent of which was paid by taxpayers.¹¹⁰

Senator Chuck Hagel authored a rival bill, illustrating the position of some of McCain-Feingold's opponents, entitled the Open and Accountable Campaign Financing Act of 2001, which would cap soft-money contributions at \$60,000 per calendar year per individual, rather than eliminate soft money entirely.¹¹¹ Senator Hagel's spokesperson confirmed that "the White House is generally supportive" of Hagel's campaign finance proposal; however, a White House spokesperson declined to state "whether Bush backs the Hagel bill."¹¹²

President Bush's position on the campaign finance reform issue, as outlined during the 2000 Presidential campaign, favors soft-money caps for unions and corporations but not for individuals.¹¹³ President Bush is said to be leaning towards

¹⁰⁸ H.R. 380 § 701. The Shays-Meehan Act also requires political parties to reimburse the government for the use of Air Force One for fundraising purposes. *Id.* § 1001. For a fuller discussion of the 1996 fundraising problems, see *supra* note 85 and accompanying text.

¹⁰⁹ George Lardner Jr., *GOP Report Raps 'Air Hillary' Costs: Clinton's Travel Bill Tops \$182,000*, WASH. POST, Mar. 24, 2000, at A6, available at 2001 WL 2292813.

¹¹⁰ *Id.*

¹¹¹ S. 22, 107th Cong. (2001). Seven Senators, largely Republican, co-sponsored the bill upon its introduction by Senator Hagel. Senator Hagel's proposal also provides across-the-board increases to the contribution limits in the Federal Election Campaign Act of 1971 and requires the limits in the proposal to be adjusted based on price index increases in the future. S. 27, § 203(a)-(c). Other Senators continue to be named co-sponsors of the Act. See 147 CONG. REC. S1021 (daily ed. Feb. 1, 2001) (adding Senator Enzi, R-WY, as co-sponsor); 147 CONG. REC. S587 (daily ed. Jan. 25, 2001) (adding Senator Hutchinson, R-AR, as co-sponsor); 147 CONG. REC. S498 (daily ed. Jan. 23, 2001) (adding Senator Roberts, R-KS, as co-sponsor).

¹¹² Nick Anderson, *For Election Finance Reform Backers, Heat Is On*, L.A. TIMES, Mar. 15, 2001, at A16, available at 2001 WL 2470019.

¹¹³ Dan Balz & Ruth Marcus, *Bush to Offer Campaign Finance Guidelines*:

the ideas embodied in Senator Hagel's proposal and to be focusing on alternatives that would cap, rather than ban, individual soft-money expenditures.¹¹⁴

Senator McCain's campaign finance reform package has been modified through the amendment process during the floor debate in the Senate. Several amendments have slightly shifted the scope and focus of Senate Bill 27, while many more proposed amendments attempted to greatly constrict its coverage.¹¹⁵ Somewhat surprisingly, several of the successful amendments to the bill actually strengthened its overall impact, rather than the "watering-down" many have come to expect of the amendment process.¹¹⁶ Two amendments (one proposed by Senator Harkin and another proposed by Senators Frist and Breaux) that would have made certain key portions of Senate Bill 27 "nonseverable," and were called "poison pills" by McCain-Feingold backers, failed. However, the mere occurrence of Senate debate on campaign finance reform illustrates a significant shift in opinion among its opponents, when just over a decade ago it took the threat of arrest and armed police officers just to get opponents of campaign finance reform legislation to be physically present on the Senate floor.¹¹⁷ The extension of coverage to interest groups and the refusal even to vote on the nonseverability provisions repeatedly introduced indicates just how far congressional opinion has shifted and how serious the Senate now seems to be about implementing serious and meaningful reforms.

McCain-Feingold passed the Senate, as amended, 59-41, on April 3, 2001.¹¹⁸ On July 12, 2001, House debate on campaign finance reform came to a standstill after a 228-203 vote reject-

Aides Signal White House Desire to Fashion Reform Legislation the President Can Sign, WASH. POST, Mar. 15, 2001, at A4, available at 2001 WL 2551202.

¹¹⁴ See Broder, *supra* note 95, at B7.

¹¹⁵ See *infra* apps. 1-2.

¹¹⁶ See *infra* app. 1. Senate Amendment 145 extends restrictions on "electioneering" communications to some non-profits, and Senate Amendments 163 and 166 increase the penalties levied against those who violate campaign finance law. See *infra* app. 1.

¹¹⁷ See *supra* notes 76-82 and accompanying text.

¹¹⁸ Alison Mitchell, *Campaign Finance Bill Passes in Senate, 59-41: House Foes Vow a Fight*, N.Y. TIMES, Apr. 3, 2001, at A1.

ed the rules for debate proposed by Representative Dennis Hastert.¹¹⁹ The proposed rules called for consideration of each amendment to the legislation individually, rather than as a whole.

In a move reminiscent of (although not quite as dramatic as) the 1988 decision to issue arrest warrants for absentee Senators opposed to pending campaign finance reform legislation,¹²⁰ supporters of the Shays-Meehan bill also decided to employ a seldom-used procedural tool—the discharge petition—designed to bring the bill to the House floor for debate.¹²¹ Before the early August recess, Shays-Meehan supporters gathered 205 of the 218 signatures needed to bring the measure to the floor.¹²²

On September 11, 2001, the focus of the House of Representatives was unexpectedly and violently shifted following terrorist attacks on the World Trade Center and the Pentagon.¹²³ In the days immediately following the attacks, the House passed a resolution authorizing the President to use military force to respond and focused on other issues directly connected to the events of September 11, 2001.¹²⁴ It remains unclear when or if campaign finance reform will again be the focus of nationwide attention.

¹¹⁹ Alison Mitchell, *Campaign Bill's Allies Vow to Return Issue to House*, N.Y. TIMES, July 14, 2001, at A10.

¹²⁰ See *supra* notes 76-82 and accompanying text.

¹²¹ A successful discharge petition would force a House vote on the piece of legislation at issue. Editorial, *The Battle to Save Shays-Meehan*, N.Y. TIMES, July 30, 2001, at A16. A successful discharge petition requires at least 218 signatures, or a majority of the members of the House of Representatives. *Id.*

¹²² *The Urgent Business of the House*, N.Y. TIMES, Aug. 30, 2001, at A20.

¹²³ Alison Mitchell & Katharine Q. Seelye, *Horror Knows No Party As Lawmakers Huddle*, N.Y. TIMES, Sept. 12, 2001, at A20.

¹²⁴ H.R.J. Res. 63, 107th Cong. (2001). Senator John McCain stated, "These attacks clearly constitute an act of war. I mean unwarranted, unprovoked attacks against innocent American citizens is clearly an act of war, and one that requires that kind of national response and international response." Mitchell & Seelye, *supra* note 123.

VII. OBSERVATIONS AND A SUGGESTION FOR CHANGE

While the future of campaign finance reform is again uncertain, the increasingly powerful role of print and broadcast media presents a considerable obstacle for future campaign finance reform.¹²⁵ A provision addressing the mushrooming power of the media in the campaign finance power balance should be an essential element of future campaign finance reform proposals. In the years since *Buckley*, methods of political communication have multiplied at an exponential rate. From e-mail to cellular phones to wireless Internet, numerous advances in the telecommunications sector have created new ways for politicians and political parties to reach voters. This increased growth also creates increased costs for politicians and political parties,¹²⁶ as there are more ways they can and simply must connect with potential voters and contributors. The only way to deal with these rising costs is for politicians and political parties to focus more time and energy on fundraising.

The media executives protesting proposals mandating free air time for political candidates are correct. They should not be required to subsidize air time for political candidates at their own expense.¹²⁷ Future campaign finance reform proposals should change the procedure for funding the Presidential Cam-

¹²⁵ Media income from political advertising has skyrocketed in the past two decades, from around \$90 million in 1980 to over \$498 million in 1998. See Charles Lewis, *Media Money: How Corporate Spending Blocked Political Ad Reform & Other Stories of Influence*, COLUM. JOURNALISM REV., Sept.-Oct. 2000, at 20, 26. News coverage of political candidates has suffered a corresponding decline, and some scholars posit that the pattern can be explained by the media's vested interest in forcing politicians to purchase media coverage. *Id.* Free air time for political candidates has been suggested as a part of the possible solution to the campaign finance reform problem. However, from 1996 to 1998, a group of six media corporations (the National Association of Broadcasters, ABC, CBS, Meredith Corporation, A. H. Belo and Cox Enterprises) spent almost \$11 million to defeat campaign finance reform proposals containing provisions requiring free air time for political candidates. *Id.* at 27. A Meredith Corporation lobbyist complained that policies mandating free air time for political candidates "are basically picking the pockets of a select group, namely television broadcasters." *Id.*

¹²⁶ See *supra* note 125 and accompanying text for a complete discussion of the recent increase in media income from political advertising.

¹²⁷ See *supra* note 125 and accompanying text.

paign Fund Act. The tax check-off system initiated in 1971 should be changed from a voluntary three dollar donation to a voluntary donation of a size to be determined by the taxpayer.¹²⁸

If the amended system results in additional funds in the Presidential Campaign Fund, the Werthheimer-Manes "voter communications voucher" proposal should be applied to Presidential elections.¹²⁹ The problems plaguing the electoral system in this country are not unique to Congressional races. This proposal would have two-fold benefits: not only would it offer legislators a more accurate and complete measure of public opinion on increased public financing of Presidential elections, but it may also provide a larger revenue source for the Presidential Campaign Fund, to address the ever-increasing media costs associated with political elections.

VIII. CONCLUSION

The arena where the battle over campaign finance reform is waged has shifted frequently in recent months. Certain compromises must be made in order to achieve substantive change, rather than continued legislative deadlock. First, the amendment restricting "electioneering communications" creates several potential problems for the success of the Bipartisan Campaign Reform Act of 2001 and future campaign finance reform proposals. As recently as 1996 and 1997, courts have found similar codification of restrictions on "electioneering communications" unconstitutional.¹³⁰ The possibility of significant new

¹²⁸ See *supra* notes 27, 32 and accompanying text. Currently, the Internal Revenue Service's Form 1040 contains a section entitled "Presidential Election Campaign" that asks, "Do you, or your spouse if filing a joint return, want \$3 to go to this fund?" I.R.S. Form 1040 (2000). Space is provided for the individual and spouse (if applicable) to check yes or no. *Id.* Under this proposal, two lines would be added to this section of the IRS Form 1040. This section, as updated, would ask, "Do you, or your spouse if filing a joint return, want to make an additional contribution to this fund?" Directions would specify that additional contributions must be made in whole dollars only and, like the three-dollar check-off, do not reduce or change tax liability. Space would be provided for the individual and spouse (if applicable) to write in any additional amount contributed.

¹²⁹ See *supra* note 38 and accompanying text.

¹³⁰ *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp 8, 12 (D. Me.) (holding

restrictions on union political activity is likely to mobilize the union lobbying machine to act quickly and decisively to protect the status quo.¹³¹

Also, in *Mills v. Alabama*,¹³² the Supreme Court stated that restrictions on communications based on the proximity to an election are unconstitutional and "silence the press at a time when it can be most effective."¹³³ However, the McCain-Feingold and Shays-Meehan proposals differ substantially from the statute the Supreme Court found unconstitutional in *Mills*, since they do not outlaw "electioneering communications" but simply attempt to control such communications and to prevent organizations from attempting to subvert the purpose of existing campaign finance laws.¹³⁴ Furthermore, the Breyer concurrence in *Shrink Missouri Government PAC* may indicate that new attempts at campaign finance reform may be reviewed more leniently, and, at the very least, that some members of the United States Supreme Court have serious reservations issuing a ringing endorsement of the *Buckley* framework.¹³⁵ Additionally, there is Supreme Court precedent in *United States v. CIO* suggesting that the differentiation between "expenditures" and "contributions" is perhaps not as clear as the *Buckley* Court made it out to be.¹³⁶

The additional restrictions on "electioneering communications" in McCain-Feingold and Shays-Meehan address a critical area of controversy. The language of the Supreme Court in *Buckley*'s footnote fifty-two was not limiting, but rather stated that the statute's application was limited to "communications

Mass. Citizens for Life protects public from government prohibition of "issue advocacy"), *aff'd*, 98 F.3d 1 (1st Cir. 1996).

¹³¹ See *supra* note 101 and accompanying text.

¹³² 384 U.S. 214 (1966).

¹³³ *Mills*, 384 U.S. at 219. The Court explained that it would be "difficult to conceive of a more obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press." *Id.* The Alabama statute at issue in this case made "it a crime 'to do any electioneering or to solicit any votes . . . on the day on which the election affecting such candidates or propositions is being held.'" *Id.* at 216.

¹³⁴ See *supra* notes 99-100 and accompanying text.

¹³⁵ See *supra* notes 93-94 and accompanying text.

¹³⁶ See *supra* note 16 and accompanying text.

containing express words of advocacy of election or defeat, *such as* 'vote for,' 'elect,' 'support,' 'cast your ballot for' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"¹³⁷ The phrase "such as" has been interpreted to mean "including *and* limited to" rather than "including *but not* limited to," and footnote fifty-two's enumerated words and phrases have simply become a list of what to avoid in "issue advocacy."

The spirit of the *Buckley* holding is violated, for example, when the phrase "issue advocacy" is used to justify an organization's "informational" advertisements disseminated just weeks before an election that highlight the achievements of a particular political candidate and use his picture and name (but carefully avoid *Buckley's* "magic words"). It is simply illogical to continue to argue that such examples of "issue advocacy" fall outside what the Supreme Court intended to be a reasonable and flexible definition of "express advocacy." While the provisions regulating electioneering communications in McCain-Feingold and Shays-Meehan are drastic, they are integral parts of the bills and are likely to appear in future campaign finance reform proposals, since it is simply unclear whether such provisions would be held constitutional.

President George W. Bush has voiced his opposition to complete elimination of "soft money" contributions, stating that he instead prefers restrictions on "soft money" contributions (especially for individual contributions), rather than complete elimination.¹³⁸ A second campaign finance reform veto by the second President Bush raises a somewhat eerie historical specter. Undoubtedly, the media reaction to a second Bush veto of campaign finance reform legislation would be overwhelmingly negative.¹³⁹ The overriding of President Truman's veto of the Taft-Hartley Act in 1947 illustrates that Congress can implement real reforms that reach the area of campaign finance, regardless of the President's approval.

However, it is unclear whether McCain-Feingold (or later

¹³⁷ *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (emphasis added); *see also supra* note 64 and accompanying text.

¹³⁸ *See supra* notes 113-14 and accompanying text.

¹³⁹ *See supra* notes 83-84 and accompanying text.

versions of the 2001 proposal) would have the votes needed to override a Presidential veto. The Senate passed McCain-Feingold by a 59-41 vote, and votes of two-thirds of the Members of the Senate and the House of Representatives would be needed to override a Presidential veto.¹⁴⁰ However, these figures do not take into account any "strategic voting" by Members, where Senators or Representatives who actually support the bill moved to the opposition when it became clear the bill had enough votes to pass. If any such "strategic voters" exist, a Presidential veto may force them to act, and Congress could then realistically override that veto.

The goal of campaign finance reform supporters should now be to get some form of campaign finance reform passed through the United States Congress and signed into law by the President. The current American political atmosphere may not be ready for any new changes in the tax code, and opposition to increased public financing of elections is strong. McCain and his supporters may be forced to compromise by creating limitations on "soft money" contributions rather than a complete abolition of such funds. The tax-exempt groups affected by any potential restrictions on "electioneering communications" may pressure for passage of a version of the bill without that provision. Ultimately, a "nonseverability" provision may even find its way into a later version of the bill. Small compromises, such as those mentioned here, will not compromise the ultimate integrity of the Act but may transform it from a possibility into a reality, a metamorphosis too long in coming.

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¹⁴⁰ U.S. CONST. art. I, § 7, cl. 2. The Constitutional procedure for overriding a Presidential veto of McCain-Feingold would be to first send the vetoed bill back to the originating body (the Senate, in this case) for reconsideration. *Id.* If two-thirds of the Members of the Senate vote in favor of the bill, it is sent to the non-originating body (the House of Representatives, in this case) where the bill shall become law if two-thirds of that body also vote for the bill. *Id.*; see *supra* note 111 and accompanying text.

APPENDIX 1:
March 2001 Major Amendments to Senate Bill 27¹⁴¹

Amend- ment	Sponsor	Purpose	Final Ac- tion	Date
S. Amdt. 115	Domenici- Dewine	Modify contribution limita- tions in response to expen- diture of a candidate's personal funds	Agreed to 70-30	3/20/01
S. Amdt. 122	Torricelli	Require lowest rates of air time for political parties buying air time for candidates	Agreed to 70-30	3/21/01
S. Amdt. 124	Landrieu	Create software standards allowing for compliance through Internet disclosure	Agreed to (as modified) by voice vote	3/22/01
S. Amdt. 137	Cochran	Provide increased disclo- sure requirements	Agreed to (as modified) by voice vote	3/22/01
S. Amdt. 139	Nickels	Strike section 304 of Sen- ate Bill 27, the codification of the <i>Beck</i> decision	Agreed to 99-0	3/22/01
S. Amdt. 145	Wellstone	Extend electioneering com- munications restrictions to some tax-exempt organiza- tions.	Agreed to 51-46	3/26/01
S. Amdt. 149	Thompson	Modify and index Senate Bill 27 contribution limits	Agreed to (as modified) 84-16	3/28/01
S. Amdt. 153	Schumer	Condition preferential media rates on compliance with coordinated spending caps	Agreed to 52-48	3/28/01
S. Amdt. 140	Specter	Clarify phrase "election- eering communications"	Agreed to (as modified) 82-17	3/29/01
S. Amdt. 157	Bingaman	Require contribution dis- closure to Presidential Inaugural Committee	Agreed to by voice vote	3/29/01
S. Amdt. 159	Nelson (FL)	Forbid fraudulent solici- tations	Agreed to by voice vote	3/29/01

¹⁴¹ Information on Senate Bill 27 contained in this Appendix may be accessed on the Internet at <http://thomas.loc.gov> under the heading "All Bill Summary & Status Info."

S. Amdt. 160	Kerry	Study state laws providing public funding for elections	Agreed to by voice vote	3/29/01
S. Amdt. 161	Levin	Amends definition of "federal election activity"	Agreed to by voice vote	3/29/01
S. Amdt. 162	Durbin	Clarify standards for identification of election-related advertising sponsors	Agreed to by voice vote	3/29/01
S. Amdt. 163	Thompson	Strengthen criminal penalties for violations of election law	Agreed to by voice vote	3/29/01
S. Amdt. 166	Bond	Strengthens penalties for making or taking contributions in another's name	Agreed to (as modified) by voice vote	3/30/01
S. Amdt. 167	Hatch	Creates expedited judicial review of Senate Bill 27	Agreed to by voice vote	3/30/01

APPENDIX 2:
March 2001 Major Proposed Amendments to S. 27¹⁴²

Amend- ment	Sponsor	Purpose	Final Ac- tion	Date
S. Amdt. 112	Domenici	Increase contribution limits in response to candidate's use of personal wealth	Tabled 51-48	3/19/01
S. Amdt. 117	Bennett	Prohibit separate segregated funds	Not Passed 37-63	3/20/01
S. Amdt. 118	Smith, G.	Prohibit candidates and Members of Congress from receiving some contributions when Congress is in session	Tabled 74-25	3/20/01
S. Amdt. 123	Wellstone	Allow states to create voluntary public financing election system for federal elections in that state	Not Passed 36-64	3/21/01
S. Amdt. 134	Hatch	Strike section 304 and add clause requiring consent and disclosure of members or shareholders before using funds for political purposes	Tabled 69-31	3/21/01
S. Amdt. 136	Hatch	Add clause requiring disclosure before using funds for political activities	Tabled 60-40	3/22/01
S. Amdt. 146	Hagel	Require increased reporting and increase individual contribution limits	Tabled 60-40	3/27/01
S. Amdt. 148	Kerry	Provide some public financing for Senate candidates who comply with voluntary spending limits.	Not agreed to	3/27/01
S. Amdt. 151	Feinstein	Clarify individual contribution limits	Withdrawn	3/28/01
S. Amdt 152	Dewine	Strike Title II of the Wellstone amendment (S. Amdt. 145) dealing with citizens' groups	Not Passed 78-22	3/29/01

¹⁴² Information on Senate Bill 27 contained in this appendix may be accessed on the Internet at <http://thomac.loc.gov> under the heading "All Bill Summary & Status Info."

S. Amdt. 155	Harkin	Create voluntary spending limit system for Senate election campaigns	Not agreed to 32-67	3/29/01
S. Amdt. 156	Frist/ Breaux	Create nonseverability of certain parts of Senate Bill 27	Tabled 57-43	3/29/01
S. Amdt. 158	Bingaman	Allow candidate response to negative non-candidate advertising	Tabled 72-28	3/29/01
S. Amdt. 164	Reed	Amend FEC authority and enforcement provisions	Not agreed to by voice vote	3/30/01
S. Amdt. 168	Harkin	Create nonseverability of soft money ban and increase in hard money contribution limits	Not agreed to by voice vote	3/30/01

RECENT DECISIONS

Constitutional Law—First Amendment—Speech Discussing Otherwise Permissible Subjects Cannot Be Excluded from a Limited Public Forum on the Ground That the Subject Is Discussed from a Religious Viewpoint*

I. FACTS

In September of 1996, Steven and Darleen Fournier, sponsors of a private Christian youth group named the Good News Club (Club), requested permission from the Milford Central School District (Milford) to hold the Club's weekly meetings in the Milford School cafeteria during after-school hours.¹ Milford refused the Fourniers' request, stating that the Club's meetings were tantamount to "religious worship," which was in contradiction of Milford's stated community-use policy.²

* Outstanding Case Note Award. Presented by the law firm of Ott and Purdy of Jackson, Mississippi.

¹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001). Pursuant to New York statute, Milford established seven policies for which its facilities could be used during after-school hours. *Good News Club*, 533 U.S. at 102. The Fourniers were qualified to use Milford's facilities because they resided within the Milford School District. *Id.* at 103. However, the Fourniers had to first receive permission from Dr. Robert McGruder, interim superintendent of the Milford Central School District, before being permitted to use Milford's facilities. *Id.*

² *Id.* The Fourniers cited in their application for use of the school facility that the Club's primary purpose was to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture." *Id.* The community-use policy, how-

Following the refusal, the Club sent a letter to the School Board clarifying the nature of the Club's activities.³ Upon review of the explanatory materials, in February of 1997, the School Board formally rejected the Club's request to use Milford's facilities.⁴ The School Board based this decision on the grounds that the Club's sole purpose was to conduct "religious instruction and Bible study."⁵ Subsequently, in March of 1997, the Good News Club, Ms. Fournier and her daughter, Andrea (Petitioners), filed suit against Milford in the United States District Court for the Northern District of New York.⁶ The petitioners alleged that their First Amendment free speech rights had been violated when they were denied access to Milford's facilities.⁷ In April of 1997, the district court

ever, precluded use of the school facilities "by any individual or organization for religious purposes." *Id.*

³ *Id.* Prior to sending the clarifying information to the School Board, an attorney representing the Club sent a letter to Milford's attorney. *Id.* It was only then that Milford's attorney requested information discussing the nature of the Club's activities. *Id.*

⁴ *Id.* at 104. The materials sent by the Club explained that during a normal meeting, children would recite Bible verses, sing Christian songs, pray and discuss the applicability of Bible passages to everyday life. *Id.* at 103.

⁵ *Id.* at 104. The Board believed that the proposed activities of the Club constituted impermissible religious instruction, rather than permissible discussions of secular subjects from a religious viewpoint. *Id.*

⁶ *Good News Club*, 533 U.S. at 104. The petitioners filed the action pursuant to 42 U.S.C. § 1983. *Id.*

⁷ *Id.* One of the stated uses for which Milford's facilities were available for public use was "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." *Id.* at 102. Both petitioners and Milford agreed that Milford created a limited public forum when it opened its facilities for public use. *Id.* at 106. The petitioners argued that the Club utilized the facilities for the acceptable purpose of teaching moral and character development. *Id.* at 108. For this reason, the Club claimed that Milford violated the Free Speech Clause of the First Amendment. *Good News Club*, 533 U.S. at 104. Milford countered these allegations with two primary arguments: First, that the Club was primarily religious in nature and not just a Club teaching from a religious perspective. *Id.* at 108. Second, Milford argued that its interest in adhering to the Establishment Clause compelled it to discriminate against the Club, even if that meant engaging in otherwise impermissible viewpoint discrimination. *Id.* at 112.

The Club also alleged that its Fourteenth Amendment right to equal protection and its right to religious freedom under the Religious Freedom Restoration Act of 1993 had been violated. *Id.* at 104. The district court dismissed the Club's

granted the Club's motion for a preliminary injunction barring the school from denying the Club access to its facilities.⁸ In August of 1998, however, the district court vacated this preliminary injunction and granted Milford's request for summary judgment.⁹ The United States Court of Appeals for the Second Circuit affirmed the district court's ruling.¹⁰ The United States Supreme Court granted certiorari and held: reversed and remanded.¹¹ A speaker who wishes to use a limited public forum to discuss an otherwise permissible topic cannot be denied access to the facility based solely on the speaker's religious viewpoint because the First Amendment of the Constitution prohibits discrimination based upon point of

religious freedom claim, however, after the Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), held that this Act was unconstitutional. *Good News Club*, 533 U.S. at 104 n.1.

⁸ *Good News Club*, 533 U.S. at 104. After the district court granted an injunction, the Club used Milford's facilities from April, 1997, until June, 1998. *Id.*

⁹ *Good News Club v. Milford*, 21 F. Supp. 2d 147, 154 (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001). The district court held that Milford exercised permissible subject matter discrimination when it refused to grant the Club access to its facilities because the Club's "subject matter [was] decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under [Milford's] use policies." *Good News Club*, 21 F. Supp. 2d at 154. The district court never addressed the merits of the Defendant's claim that it was required to exclude the Club because of the Establishment Clause, however, because the court had already ruled that Milford's exclusion of the Club constituted constitutionally permissible subject matter discrimination. *Id.* at 160. The district court further rejected the Club's equal protection claim. *Id.* at 160-61. It stated that Milford could not have violated the Equal Protection Clause because all groups that wanted to use public facilities to further a religious cause were excluded under New York statute. *Id.* at 161.

¹⁰ *Good News Club v. Milford*, 202 F.3d 502, 511 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001). The Second Circuit held that the Club's activities were decidedly religious in nature, and for this reason, the Club was denied access to Milford's facilities based upon constitutionally acceptable subject matter discrimination and not unconstitutional viewpoint discrimination. *Good News Club*, 202 F.3d at 510-11. However, the dissenting judges asserted that the exclusion of the Club constituted impermissible viewpoint discrimination, based on the fact that the Club was being excluded because of its religious viewpoint. *Id.* at 514.

¹¹ *Good News Club*, 533 U.S. at 106, 120. The Court held that the Club was discussing permissible subject matter according to Milford's stated forum use policy, and therefore, the Club was being precluded from utilizing the school's facilities solely because of the Club's religious viewpoint. *Id.* at 111-12. The Court also dismissed Milford's Establishment Clause claim as invalid. *Id.* at 120.

view.¹²

II. RELATED LAW

Although the First Amendment guarantees the right to free speech,¹³ it also enjoins the government from passing laws that either establish or discriminate against any religion.¹⁴ In instances where a person attempts to use a public facility for the purpose of discussing a subject that is allegedly religious in nature, a conflict arises between a person's right to free speech and the need to adhere to the Establishment Clause.¹⁵ This section examines how the Supreme Court has

¹² *Id.* at 112. The Court held that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the grounds that the subject is discussed from a religious viewpoint." *Id.*

¹³ U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech" *Id.* The Supreme Court held that the Fourteenth Amendment placed the same restrictions upon the states that the First Amendment placed upon Congress. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

¹⁴ U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" *Id.* The Supreme Court remains divided as to what test should be used to determine whether the Establishment Clause was violated. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (championing "Endorsement test"); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (establishing "Lemon test"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (espousing "Wall of Separation" test). But see *Mitchell v. Helms*, 530 U.S. 793, 873-74 (2000) (Souter, J., dissenting) (noting that there are problems with "Wall of Separation" test); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993) (Kennedy, J., concurring) (concluding that question of whether religion was "endorsed" by government is not consistent with prior Supreme Court analysis in determining whether Establishment Clause was violated); *Allegheny County v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring) (stating "Lemon test" should not be adopted as primary test).

¹⁵ Steffen N. Johnson, *A Civil Libertarian Case for the Constitutionality of School Choice*, 10 GEO. MASON U. CIV. RTS. L.J. 1, 31 (1999) (observing that tension exists between "the Establishment Clause and the Free Speech and Free Exercise Clauses"). The Supreme Court's first modern case focusing on the Establishment Clause was *Everson*. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 839 (1995). In *Everson*, the Court noted that since the First Amendment's inception, the Amendment's purpose has been to prevent government intrusion on religion. *Everson*, 330 U.S. at 13; cf. *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (observing that effect of government action cannot be to advance or to inhibit religion). See generally D. Michael Murray, Note, *Rosenberger v. Rector and Board of Visitors of the University of Virginia: A Battle Between Establishment Clause Principles and First Amendment Clauses Further Weakens the Wall of*

balanced these competing interests in the past, and what effect those decisions have on government entities and religious groups as to the use of public facilities.¹⁶

A. Public Forum Doctrine

The Supreme Court addressed the issue of whether a school district violated the Free Speech Clause when it granted one union group access to its interschool mail system but denied similar access to a rival union group in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.¹⁷ In *Perry*, the Metropolitan School District of Perry Township (School District) refused to grant Perry Local Educators' Association (PLEA) access to its interschool mail facilities, while at the same time, allowed Perry Education Association (PEA) access to the facilities.¹⁸ The Court held that the School District could grant PEA, but not PLEA, access to its interschool mail system without violating PLEA's free speech rights.¹⁹ The

Separation, 46 DEPAUL L. REV. 569, 571-72 (1997) (noting purpose of Establishment Clause is to prevent government or any governmental action from establishing or discriminating against religion). In *Everson*, the Court stated that the Establishment Clause created "a wall of separation between Church and State." *Everson*, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

¹⁶ Martha M. McCarthy, *Community Groups Using Public Schools for Religious Meetings: Will It Be Good News?*, 152 EDUC. L. REP. 15, 18 (2001) (observing that Supreme Court appears to place more importance on Free Speech rights than on Establishment Clause); see also Sara R. Grossman, Comment, *The Football Game Prayer Decision: How the Supreme Court Dropped the Ball in Santa Fe*, 38 HOUS. L. REV. 615, 648-49 (2001) (discussing murkiness of Establishment Clause jurisprudence in future).

¹⁷ 460 U.S. 37 (1983).

¹⁸ *Perry*, 460 U.S. at 38-39. The School District was composed of thirteen separate public schools. *Id.* at 39. The schools communicated with each other using an interschool mail system. *Id.* PEA and PLEA were two rival unions that represented the teachers in the School District. *Id.* Prior to 1977, each union had equal access to the School District's interschool mailing facilities. *Id.* However, in 1977, PEA beat PLEA in an election to determine which union was to become the exclusive representative of the teachers in the School District. *Perry*, 460 U.S. at 40. The School District then granted PEA exclusive access to its interschool mailing system and all of the teachers' mailboxes. *Id.* at 40.

¹⁹ *Id.* at 53. The Court noted that "[t]here [was] no question that constitutional interests [were] implicated by denying PLEA use of the interschool mail system." *Id.* at 44; see *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S.

Perry Court espoused the Public Forum Doctrine, which described the three types of forums and the differing amounts of deference that are given to free speech rights in each of these forums.²⁰ The Court then held that the interschool mail system was a nonpublic forum, and, for this reason, the School District could deny PLEA access to its interschool mail facility based upon subject matter discrimination without violating

503, 506 (1969) (stating "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). *But see* Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972) (holding that neither teachers nor students have absolute constitutional right to use school buildings for unlimited expressive purposes).

²⁰ *Perry*, 460 U.S. at 45-46. *See generally* Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 FORDHAM URB. L.J. 1255, 1269 (1995) (listing three types of forums: traditional, designated, nonpublic). Traditional public forums are those places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Designated public forums are those public places that the state "has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. In each of these two forums, solely content-based regulations by states are permissible but only if the state first proves a compelling governmental interest and then shows that the means chosen were narrowly tailored to achieve that end. *Id.*; *see* *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (noting that government may regulate time, place and manner of expressive activity in limited public forums). *See generally* Marcus C. Johnson, Note, *Let Freedom Reign*, 53 RUTGERS L. REV. 485, 490 (2001) (observing that Supreme Court allows states to enforce "time, place, and manner regulations which are content-neutral, narrowly tailored to serve a significant government interest, and permit other forms of communication"). The state does have power over time, place and manner restrictions. *Id.* All other types of public property are classified as nonpublic forums. *Perry*, 460 U.S. at 46; *see* *United States v. Grace*, 461 U.S. 171, 178 (1983) (stating nonpublic forums are those places that are publicly owned but have not been traditionally held open for use of communicative activities); *see also* *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (stating that designated public forums can be distinguished from nonpublic forums based on whether government grants general access to entire class of speakers or whether "it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it"). *See generally* Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 445-46 (2001) (differentiating designated forums from nonpublic forums). In addition to being able to regulate time, place and manner restrictions, a state in a nonpublic forum can further "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views." *Perry*, 460 U.S. at 46.

PLEA's free speech rights.²¹

*B. Distinguishing Subject Matter from
Viewpoint Discrimination in Limited Public Forums*

In *Lamb's Chapel v. Center Moriches Union Free School District*,²² the Court determined whether an organization's free speech rights were violated when it was denied access to a limited public forum because the organization wanted to show a film series and lecture that was religious in nature.²³ In *Lamb's Chapel*, an evangelical church group claimed that its First Amendment rights to free speech were violated when it was not allowed to use public school facilities to hold a religiously oriented film series and lecture.²⁴ The Court found

²¹ *Perry*, 460 U.S. at 46. The Court held that the interschool mail system was a nonpublic forum because it was not held open to the general public. *Id.* at 53. The School District could therefore selectively open its facilities without transforming the school's facilities into a public forum. *Id.* at 47; see *Grace*, 461 U.S. at 178 (noting property is not transformed into public forum "merely because public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours"); cf. *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that military base was not transformed into public forum just because civilian speakers were periodically invited onto base). The Court held that the school's decision to allow PEA, but not PLEA, access to its facilities was based on "the status of the respective unions rather than their views." *Perry*, 460 U.S. at 49. Thus, the denial was based on constitutional subject matter discrimination and not impermissible viewpoint discrimination. *Id.* at 49. See generally Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 158 (2000) (noting subject matter restrictions are tolerated in nonpublic forums); Matthew D. McGill, Note, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 935 (2000) (discussing permissible restrictions on speech in nonpublic forums).

²² 508 U.S. 384 (1993).

²³ *Lamb's Chapel*, 508 U.S. at 387. The School District also asked the Court to address whether, regardless of the fact that it may have violated *Lamb's Chapel's* free speech rights, the Establishment Clause compelled the School District to exclude the religiously oriented film series. *Id.* at 394; see *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (stating "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech"); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (holding that state interest in avoiding Establishment Clause violation "may be [a] compelling" interest justifying curtailment of free speech that would otherwise be permitted by First Amendment).

²⁴ *Lamb's Chapel*, 508 U.S. at 389. New York law enumerated several purpos-

that the School District exercised viewpoint discrimination when it refused to grant Lamb's Chapel access to its facilities because of the lecture's religious orientation.²⁵ However, the Court refused to address the issue of whether the School District's interest in adhering to the Establishment Clause was sufficiently compelling to justify its abridgment of Lamb's Chapel's free speech rights.²⁶ The Court reasoned that the purpose of the lecture was to discuss permissible subject matters under section 414, and because the School District was unable to present any valid argument explaining why it exercised viewpoint discrimination, the School District violated Lamb's Chapel's free speech rights.²⁷

es for which the general public could use a public school's facilities. *Id.* at 386; see N.Y. EDUC. LAW § 414 (McKinney 2000 & Supp. 2001) (vesting school districts with authority to regulate use of their facilities during after-school hours). In its application to use the facilities, Lamb's Chapel stated that the film series was a "[f]amily oriented movie—from a Christian perspective." *Lamb's Chapel*, 508 U.S. at 389. School boards lacked authority under section 414, however, to grant religious organizations access to public facilities. *Trietley v. Bd. of Educ.*, 409 N.Y.S.2d 912, 915 (N.Y. App. Div. 1978).

²⁵ *Lamb's Chapel*, 508 U.S. at 394. The Court acknowledged that the school district had created a limited public forum. *Id.* at 391; cf. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (discussing that Minnesota State Fair represented limited public forum because it was opened to general public for people to express their views for limited amount of time). See generally Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1254 (1984) (discussing deference given to Freedom of Speech in each of three types of forums). The Court analyzed the situation to determine whether the School had been denied based upon permissible subject matter, or whether the denial was based upon impermissible viewpoint discrimination. *Lamb's Chapel*, 508 U.S. at 394; see *Perry*, 460 U.S. at 46 (stating "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of matter and speaker identity"). But see *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 65-66 (1976) (stating that First Amendment forbids any "restriction whatever on expressive activity because of its content").

²⁶ *Lamb's Chapel*, 508 U.S. at 395. The Court held that the Establishment Clause could not have been violated under the present set of circumstances because the film series was not going to be shown during school hours, was not sponsored by the school and was going to be open to the public, and therefore, "there would have been no realistic danger that the community would think that the District was endorsing religion." *Id.*

²⁷ *Id.* at 394-95; see *Denver Area Educ. Telecomm. Consortium, Inc., v. FCC*, 518 U.S. 727, 741 (1996) (stating "the First Amendment embodies an overarching commitment to protect speech from government regulation"). The test the Court

*C. Religious Groups Can Use Public Facilities
Without Violating Establishment Clause*

The Supreme Court, in *Widmar v. Vincent*,²⁸ addressed the issue of whether a university's interest in maintaining strict separation of church and state was sufficiently compelling to justify its use of content-matter discrimination in order to exclude a religious organization from utilizing a university's generally open forum.²⁹ In *Widmar*, the University of Missouri at Kansas City (University) refused to allow an evangelical group named Cornerstone to hold its weekly meetings on University grounds.³⁰ The Court held that the University's interest in adhering to the Establishment Clause was not sufficiently compelling to justify its use of content-based discrimination against Cornerstone.³¹ The Court reasoned that

uses to determine whether a governmental entity violated a person's free speech rights by exercising viewpoint discrimination is to inquire whether the activity's primary purpose is religious in nature or whether the purpose is to discuss an otherwise permissible subject matter from a religious perspective. *Lamb's Chapel*, 508 U.S. at 393-94. See generally Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 508 (2000) (observing that "subject-matter or content discrimination exists when the state attempts to prevent discussion of entire topics, rather than just specific points of view").

²⁸ 454 U.S. 263 (1981).

²⁹ *Widmar*, 454 U.S. at 270. The Court previously recognized that a public university "possesses many of the characteristics of a public forum." *Id.* at 267 n.5; see *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and [the Court] break[s] no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."). Therefore, government is allowed to discriminate in public forums if it can prove the existence of a compelling state interest and if it can show that the means chosen are narrowly tailored to achieve that end. *Perry*, 460 U.S. at 45; see *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (stating "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and that the justifications offered for any distinctions it draws must be carefully scrutinized").

³⁰ *Widmar*, 454 U.S. at 265. In 1972, the Board of Curators for the University adopted a regulation that prohibited organizations from using University buildings "for purposes of religious worship or religious teaching." *Id.*

³¹ *Id.* at 276. The Court observed that the University discriminated against certain religious organizations when it refused to allow these groups to use the

the University could have permitted Cornerstone to use its facilities without violating the Establishment Clause, and therefore the University's claim that its interest in adhering to the Establishment Clause required it to exercise content-based discrimination lacked merit.³²

University's facilities to partake in religious discussion. *Id.* at 269; see *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 266 (1988) (noting school children still have First Amendment rights while at school). The Court then criticized the dissenting Justices' argument that Cornerstone's meetings amounted to "religious worship" and, thus, were outside of the realm of free speech protection. *Widmar*, 454 U.S. at 270. The majority stated, "We think that the distinction advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable." *Id.* at 271 n.9. The Court observed that if a University was required to distinguish between protected and unprotected speech, litigation would abound and thus, would inadvertently lead to a significant entanglement between State and religion. *Id.* However, excessive government entanglement with religion is forbidden by *Lemon*. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (noting third prong of *Lemon* test provides that statute must not "foster an excessive government entanglement with religion"); cf. *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988) (discussing third prong of *Lemon* test). But see *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 766 (1976) (observing that "[t]here is no exact science in gauging in the entanglement of church and state"). The Court then held that the University engaged in content-based discrimination when it refused to grant Cornerstone access to its facilities. *Widmar*, 454 U.S. at 269-70.

The Court next used the *Lemon* test to determine whether the Establishment Clause would have been violated had the University allowed Cornerstone to use its buildings to hold its weekly meetings. *Id.* at 271-72. The *Lemon* test asks three primary questions: 1) whether the statute has a secular legislative purpose; 2) whether the statute or policy was religiously neutral; 3) whether the statute or policy advances excessive governmental entwinement with religion. *Lemon*, 403 U.S. at 612-13. The Court noted that the first two prongs of the *Lemon* test were clearly met. *Widmar*, 454 U.S. at 271. The Court then stated that the third prong was also met because Cornerstone would have only received "incidental benefits" from being granted access to the University's facilities. *Id.* at 273; see *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771 (1973) (observing that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon a religious institution is, for that reason alone, constitutionally invalid"). See generally Regina F. Speagle, *Waging War in America's Classrooms: Recognizing the Religious Rights of Children*, 31 CUMB. L. REV. 123, 156 (2000) (observing that receiving incidental benefits from government action is different from state endorsement of religion).

³² *Widmar*, 454 U.S. at 276. The Court observed that "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by . . . the Free Speech Clause." *Id.* The Court observed that a university could maintain an equal access policy and adhere to the Establishment Clause. *Id.* at 271.

D. Religious Neutrality Requisite

In *Rosenberger v. Rector & Visitors*,³³ the Supreme Court addressed the issue of whether a university engaged in viewpoint discrimination when it denied school funds to a student publication because of its religious orientation. Further, the *Rosenberger* Court determined whether the Establishment Clause mandated that the University decline to pay the third-party contractor for the printing costs of the publication's newspapers.³⁴ In *Rosenberger*, the University of Virginia refused to authorize student funds to be used to pay the printing costs of Ronald Rosenberger's (Rosenberger) religiously oriented newspaper, *Wide Awake*.³⁵ The Court held that the University engaged in viewpoint discrimination when it refused to pay the printing costs.³⁶ The Court also stated that the University could have paid the printing costs without violating the Establishment Clause.³⁷ The Court reasoned

³³ 515 U.S. 819 (1995).

³⁴ *Rosenberger*, 515 U.S. at 837. The Court had to address the Establishment Clause issue because the court of appeals had previously held that although the University had exercised impermissible viewpoint discrimination, it was justified in this case because of the State's interest in adhering to the Establishment Clause. *Id.* at 828.

³⁵ *Id.* at 827. As a "Contracted Independent Organization," *Wide Awake* was entitled to submit bills from its third-party contractors to the Appropriations Committee at the University of Virginia, who would then make a determination as to whether money from the Student Activities Fund (SAF) would be used to pay the third-party contractors. *Id.* at 823-24. The Appropriations Committee refused to grant *Wide Awake* any money, however, on the grounds that the newspaper was "religious activity" within the meaning of the University guidelines and therefore was prevented from receiving student funds. *Id.* at 827.

³⁶ *Id.* at 832. The Court held that the SAF created a "metaphysical" limited public forum, and therefore the University could only regulate speech based on subject matter (as opposed to basing the discrimination upon viewpoint). *Id.* at 830; see *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (stating in limited public forums, government can regulate speech based on subject matter or speaker identity). To determine whether the University exercised viewpoint discrimination, the Court inquired into the activity's primary purpose, the same test used in *Lamb's Chapel*. *Rosenberger*, 515 U.S. at 838-39.

³⁷ *Rosenberger*, 515 U.S. at 840-41. A primary factor in determining whether the Court will uphold a government program in the face of an Establishment Clause claim is whether the program is neutral towards religion. *Id.* at 839; see *Bd. of Educ. v. Grumet*, 512 U.S. 687, 717-18 (1994) (O'Connor, J., concurring)

that Rosenberger's newspaper was not primarily religious in nature, and therefore the University exercised viewpoint discrimination when it refused to pay Rosenberger's printing costs.³⁸ Moreover, the Court noted that the University would not have violated the Establishment Clause by paying *Wide Awake's* printing bills, because the newspaper sought funding as a legitimate "student journal" and not as a Christian newspaper.³⁹

(stating that Establishment Clause forbids government from either favoring or discriminating against religion); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (holding "[t]he message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"). Additionally, the Court uses the *Lemon* test to determine whether a government entity has violated the Establishment Clause. See *Rosenberger*, 515 U.S. at 840-42 (discussing *Lemon* test prongs). See generally Leah Gallant Morgenstein, Board of Education of Westside Community Schools v. Mergens: Three "R's" Religion = Mergens, 41 AM. U. L. REV. 221, 226-27 (1991) (observing that Court currently uses *Lemon* test). But see *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test . . ."); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The three-part test has simply not provided adequate standards for deciding Establishment Clause cases . . .").

³⁸ *Rosenberger*, 515 U.S. at 840. The Court noted that the SAF was intended to promote the discussion of ideas at the University, which was also *Wide Awake's* primary purpose. *Id.* For this reason, the Court held that the University denied Rosenberger's request to pay the printing fees based on the newspaper's religious orientation, which constituted impermissible viewpoint discrimination. *Id.* at 832. See generally Eric J. Clearly, *In Finley's Wake: Forging a Viable First Amendment Approach to the Government's Subsidization of the Arts*, 68 FORDHAM L. REV. 965, 982-83 (1999) (discussing difference between subject matter discrimination and viewpoint discrimination).

³⁹ *Rosenberger*, 515 U.S. at 840. The Court held that the University's SAF program was religiously neutral because it neither favored nor discriminated against religion. *Id.* at 840. The student fees were mandatory for all students in order to facilitate communicative activities at the University. *Id.* Thus, the Court stated that the mandatory student fees were easily distinguishable from taxes that were unconstitutionally levied to support a church or church organization. *Id.*; cf. *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (concluding that government aid is considered to be advancing religion when it is given to institution "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.").

III. *GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL*

A. *Opinion of the Court*

In *Good News Club v. Milford Central School*,⁴⁰ the Supreme Court of the United States held that speech discussing otherwise permissible topics cannot be precluded from a limited public forum based on the premise that the subject is to be discussed from a religious viewpoint.⁴¹

The Court immediately acknowledged that the primary issue of this case dealt with the First Amendment right to free speech in a limited public forum.⁴² The Court observed that it has consistently held that discrimination based upon viewpoint runs afoul of the First Amendment's Free Speech Clause.⁴³ The Court then addressed the issue of whether Milford's exclusion of the Good News Club from its limited public forum constituted impermissible viewpoint discrimination.⁴⁴ The Court concluded that the Good News Club taught permissible subject matter according to Milford's community use policy, and therefore Milford had exercised viewpoint discrimination when it excluded the Good News Club from using its facilities.⁴⁵

⁴⁰ 533 U.S. 98 (2001).

⁴¹ *Good News Club*, 533 U.S. at 112. Justice Thomas delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Breyer joined. *Id.* at 102.

⁴² *Id.* The Court reiterated that the amount of deference given to the First Amendment depends upon the forum in which the communicative activity takes place. *Id.* at 106.

⁴³ *Id.* at 106-07. The Court noted that in *Lamb's Chapel* and *Rosenberger*, both of which the majority believed to be dispositive, it held that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 111-12.

⁴⁴ *Id.* at 107. The Court observed that in a limited public forum, which Milford's facilities were held to be, the government could permissibly restrict speech so long as the restriction was not based upon viewpoint. *Id.* The Court held that Milford engaged in viewpoint discrimination, however, because the Club's primary purpose—to teach moral and family values—was acceptable according to Milford's policy, and thus, the Club should not have been denied access to Milford's facilities. *Id.* at 108.

⁴⁵ *Id.* The Court held that simply because a communicative activity is

The Court next considered whether Milford's interest in adhering to the Establishment Clause justified its use of viewpoint discrimination.⁴⁶ The Court refused to address the merits of this allegation, however, because it held that Milford did not raise a valid Establishment Clause claim.⁴⁷

B. Justice Scalia's Concurring Opinion

Justice Scalia concurred in the *Good News Club* decision, but he wrote separately to discuss his views on two of the issues that were addressed in the majority opinion.⁴⁸ First, as to the Establishment Clause issue, Justice Scalia stated that he would simply hold as a matter of law that "giving [a private religious group] nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect."⁴⁹ Second, Justice Scalia noted that even if Milford had

"quintessentially religious" does not mean that the activity cannot also be "characterized properly as the teaching of morals and character development from a particular viewpoint." *Id.* at 111.

⁴⁶ *Good News Club*, 533 U.S. at 112-19. The Court reiterated that a government's interest in not violating the Establishment Clause may justify content-based discrimination, but since it has not examined this issue, the validity of such a claim is still questionable. *Id.* at 112-13.

⁴⁷ *Id.* at 120. The Court observed that the Establishment Clause would not have been violated in this case because, as in *Lamb's Chapel* and *Widmar*, there was no real danger that either parents or the school children would have misconstrued Milford's allowing the Good News Club to use its facilities as endorsement of religion. *Id.* at 115. The Court noted that the Good News Club met during after-school hours, required parental approval and was open to the public. *Id.* at 113.

The Court further reiterated that the Establishment Clause requires neutrality towards religion and that the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* at 114.

⁴⁸ *Id.* at 120 (Scalia, J., concurring). Justice Scalia noted that he concurred with the Court's opinion regarding the Establishment Clause issue with the understanding that physical coercion was not an issue in this case. *Id.* at 120-21.

⁴⁹ *Id.* at 121 (alterations in original). Justice Scalia argued that private speech could not violate the Establishment Clause when it "occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses." *Id.* Also, in response to the Court's analysis of whether the children would feel coercive pressure to attend

exercised subject matter discrimination when it excluded the Good News Club from its facilities, Milford still would have violated the Good News Club's free speech rights.⁵⁰ However, Justice Scalia ultimately concluded that Milford engaged in viewpoint discrimination because, according to Justice Scalia, "[f]rom no other group does respondent require the sterility of speech that it demands of petitioners."⁵¹

C. Justice Breyer's Concurring Opinion

Justice Breyer concurred with the Court's conclusion in *Good News Club*, but he disagreed with the Court's ultimate remedy.⁵² Justice Breyer reiterated that when the Court analyzes whether a public school violated the Establishment Clause, it considers numerous questions, only one of which is whether the government's actions were actually "neutral" towards religion.⁵³ Justice Breyer also stated that the majori-

the club's activities, Justice Scalia stated that "[w]hat is at play here is not coercion, but the compulsion of ideas—and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, . . . not banned by the Establishment Clause." *Id.* at 2107 (Scalia, J., concurring) (citations omitted).

⁵⁰ *Id.* at 122. In response to Justice Souter's dissent, Justice Scalia argued that the issue of forum litigation was properly before the Court because the petitioners stated in their briefs that their exclusion from Milford's facilities was unreasonable in light of the purpose served by the forum. *Id.* at 122-23. Justice Scalia then noted that "[e]ven subject-matter limits must at least be 'reasonable in light of the purpose served by the forum,'" and because Milford did not produce any legitimate reason why it discriminated against the Good News Club, Milford could not have justified its use of subject matter discrimination. *Id.* at 122.

⁵¹ *Good News Club*, 533 U.S. at 124 (Scalia, J., concurring). Justice Scalia believed that Milford exercised viewpoint discrimination when it denied the Good News Club access to its facilities because Milford allowed other organizations (such as the Boy Scouts) to use its facilities to discuss the exact issues the Good News Club wanted to discuss. *Id.*

⁵² *Id.* at 127 (Breyer, J., concurring). Justice Breyer stated that summary judgment was inappropriately granted because the case's procedural posture prevented the Court from being able to fully address the Establishment Clause question that Milford raised. *Id.* at 128-29.

⁵³ *Id.* at 127. Justice Breyer emphasized that the critical Establishment Clause question in this case was whether the children participating in the Good News Club's activities "could reasonably perceive the school's permission for the club to use its facilities as an endorsement of religion." *Id.* at 128.

ty should not have granted the Good News Club summary judgment because there were still issues of material fact that needed to be addressed before the Court could fully answer the Establishment Clause question that was presented in this case.⁵⁴

D. Justice Stevens's Dissenting Opinion

Justice Stevens dissented in the *Good News Club* decision and found that, according to the facts in the record, the Good News Club's activities amounted to speech "aimed principally at proselytizing or inculcating belief in a particular religious faith," rather than permissible activities utilizing a religious viewpoint.⁵⁵ Justice Stevens argued that this type of speech fell outside of the scope of protected speech in limited public forums.⁵⁶ Justice Stevens concluded that as long as Milford consistently refused to allow this type of speech to be discussed in its facilities, Milford was not violating the First Amendment.⁵⁷ Furthermore, Justice Stevens argued that the

⁵⁴ *Id.* at 129.

⁵⁵ *Id.* at 130 (Stevens, J., dissenting). Justice Stevens described three types of religious speech. *Id.* The first type of speech was "religious speech that is simply speech about a particular topic from a religious point of view." *Id.* The second type was speech that amounted to religious worship. *Id.* Finally, there was another type of speech that was "aimed principally at proselytizing or inculcating belief in a particular religious faith." *Good News Club*, 533 U.S. at 130 (Stevens, J., dissenting).

⁵⁶ *Good News Club*, 533 U.S. at 133 (Stevens, J., dissenting). According to Justice Stevens, speech that fell into either of the latter two categories was not protected by the First Amendment Free Speech Clause. *Id.* Justice Stevens noted that it was difficult to differentiate between speech and viewpoint but that the responsibility of drawing the distinction should rest with the elementary schools. *Id.* Moreover, Justice Stevens pointed out that state and local governments have traditionally governed public education. *Id.* at 132. Therefore, Justice Stevens argued that any dispute over whether speech is classified as religious proselytizing or speech about a particular topic from a religious point of view should be resolved without the Federal Government's intrusion into such matters. *Id.*

⁵⁷ *Id.* at 133. Justice Stevens stated that a public school's primary mission is to educate students and that Milford could have reasonably believed that the Good News Club's activities would "introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission." *Id.* at 131-32. Justice Stevens therefore concluded that as long as Milford excluded this type of speech in an even-handed manner, Milford was not violating the First Amendment Free Speech Clause. *Id.* at 133. Finally, Justice Stevens re-

Court should not have decided the Establishment Clause issue.⁵⁸

E. Justice Souter's Dissenting Opinion

Justice Souter dissented in the *Good News Club* decision and found that the majority had misinterpreted the legitimacy of the Good News Club's activities because, according to Justice Souter, it was beyond question that the Good News Club wanted to use Milford's facilities to hold "an evangelical service of worship."⁵⁹ Justice Souter also disagreed with the majority's decision not to remand on all of the other disputed issues because he believed that in granting summary judgment for the Good News Club, the Court had impermissibly usurped its jurisdiction as a court of review.⁶⁰

buked the majority's comparison of this case to *Rosenberger* because, according to Justice Stevens, the "Good News Club meetings are dominated by religious exhortation," while the organization in *Rosenberger* simply discussed appropriate topics from a religious point of view. *Id.* at 133 n.3.

⁵⁸ *Id.* at 134. Justice Stevens stated that the Court had improperly decided the Establishment Clause issue because neither the district court nor the court of appeals had addressed this issue. *Id.*

⁵⁹ *Id.* at 138-39 (Souter, J., dissenting). Justice Ginsburg joined Justice Souter's dissent. *Id.* at 134. Justice Souter criticized the majority's conclusion that the lower courts did not realize that *Lamb's Chapel* was dispositive. *Id.* at 134-35. Justice Souter instead argued that the district court, from the undisputed facts, concluded that the Good News Club's activities fell outside of the scope of protected speech according to the holding in *Lamb's Chapel*. *Id.* at 135. According to Justice Souter, unless the holding in *Good News Club* was to be limited to the facts of that particular case, then "this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque." *Id.* at 139.

⁶⁰ *Id.* Justice Souter argued that the Court should not have decided the Establishment Clause issue because there were not enough facts in the record to make any such determinations of fact. *Id.* at 140-41. Justice Souter argued that the lower courts decided this case solely on free speech grounds, and therefore the Supreme Court usurped its authority when it ruled on the validity of Milford's Establishment Clause claim. *Id.* Justice Souter also criticized the majority for holding that Milford could not have violated the Establishment Clause based upon its earlier decisions in *Widmar* and *Lamb's Chapel* because, according to Justice Souter, the record showed that the facts in the present case were easily distinguishable from those in both *Widmar* and *Lamb's Chapel*. *Id.* at 141-43. Justice Souter argued that the timing of the Good News Club's meetings "may well affirmatively suggest the *imprimatur* of officialdom in the minds of the young children." *Good News Club*, 533 U.S. at 144 (Souter, J., dissenting). Thus,

IV. DISCUSSION

In *Good News Club v. Milford Central School*, the Supreme Court reaffirmed prior decisions that held that speech discussing otherwise permissible topics cannot be excluded from a limited public forum because of the speaker's particular point of view.⁶¹ Furthermore, the Court reiterated that a school does not have a valid Establishment Clause claim if it is readily apparent that the school did not sponsor or endorse the religious activity.⁶²

The Court gives tremendous deference to the First Amendment right to free speech.⁶³ Some have even argued that because the Court has placed a greater emphasis on free speech than on the Establishment Clause, the Court has inadvertently blurred the already fuzzy line that separates church from State.⁶⁴ Due to recent Court decisions, a school now carries the virtually impossible burden of having to differentiate between an organization that is decidedly religious in nature as opposed to an organization that teaches permissible subjects utilizing a religious viewpoint.⁶⁵

Justice Souter believed that the possibility did exist that Milford would have violated the Establishment Clause but that further findings of fact were needed before an accurate conclusion could be drawn. *Id.* at 144-45. Justice Souter therefore criticized the majority decision, saying that, "there is a good case that Good News's exercises blur the line between public classroom instruction and private religious indoctrination." *Id.*

⁶¹ See *supra* notes 21, 25, 36, 43, 44 and accompanying text. The Court focuses on what the organization's primary purpose was in order to determine whether the school exercised viewpoint discrimination. See *supra* notes 36, 38 and accompanying text.

⁶² See *supra* notes 26, 47 and accompanying text. In determining whether the Establishment Clause was violated, the Court primarily analyzes whether the government's action was administered neutrally towards religion. See *supra* notes 37, 39, 47 and accompanying text.

⁶³ See *supra* notes 16, 18, 27, 32, 49 and accompanying text. The amount of deference given to free speech rights by the Supreme Court depends upon the particular forum in which the speech is to take place. See *supra* note 19 and accompanying text.

⁶⁴ See *supra* notes 16, 45 and 60. The Court has stated that while the Establishment Clause does not allow the government to endorse religion, the Clause also requires that the government refrain from discriminating against religion. See *supra* notes 14, 15, 37, 47 and accompanying text.

⁶⁵ See *supra* notes 27, 36, 44 and accompanying text. The Justices have recog-

Furthermore, the Court has made it clear that it will not find an Establishment Clause violation when a school adheres to a religiously neutral policy of allowing both religious and other types of organizations to use its facilities.⁶⁶ Thus, unless the school can provide the Court with some other justification for excluding a religious organization, it appears likely that schools will now be required to allow nearly every religious organization to use its facilities if a school chooses to open its facilities to public use.⁶⁷

V. CONCLUSION

Good News Club v. Milford Central School demonstrates the significant burden of proof that a school bears when it transforms its facilities into a limited public forum and subsequently attempts to exclude a particular religious organization from utilizing its forum. *Good News Club* makes it exceedingly evident that if the Court can find any legitimate secular purpose in the practices of the particular religious organization, then the Court will hold that the school has exercised viewpoint discrimination if it precludes the organization from using its facilities. Further, the Court in *Good News Club* sends a clear signal that a school's interest in adhering to the Establishment Clause is not a valid reason for exercising viewpoint discrimination against a religious organization. Therefore, unless the particular school has another valid reason for excluding a religious organization, the Court will hold that the school has violated the religious organization's First Amendment right to free speech.

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nized the difficulty in attempting to differentiate primarily religious speech from discussions on permissible topics from a religious viewpoint. *See supra* note 56.

⁶⁶ *See supra* notes 27, 48 and accompanying text. However, the Court continues to insist that a government's interest in adhering to the Establishment Clause could be a sufficiently compelling reason for the government to exercise otherwise impermissible viewpoint discrimination against a religious organization. *See supra* notes 23, 46 and accompanying text.

⁶⁷ *See supra* note 58 and accompanying text. It appears that the Court has concluded that free speech rights are more important than strict adherence to the Establishment Clause. *See supra* note 16 and accompanying text.

Constitutional Law—Fourth Amendment—The Warrantless Use of Thermal Imaging Technologies Is Unconstitutional

I. FACTS

On January 16, 1992, in Florence, Oregon, federal agents used a thermal imager to scan Daniel Kyllo's home to determine if the amount of heat emanating from the home was consistent with the amount of heat given off by the high-intensity lamps required for indoor marijuana growth.¹ The thermal image scan of Kyllo's home conducted from a car across the street revealed that the garage roof and one wall of the home were hot in relation to the rest of the home and considerably warmer than neighboring homes.² Based in part on the results of the thermal image scan, a federal magistrate judge issued a search warrant for Kyllo's home and federal agents conducting the search found an indoor marijuana-growing operation.³ Kyllo was indicted for manufacturing marijuana and unsuccessfully moved to suppress the evidence gathered from his home before entering a conditional guilty plea.⁴ The

¹ *Kyllo v. United States*, 533 U.S. 27, 29 (2001). The scan was conducted at 3:20 a.m. by agents of the Department of Interior. *Kyllo*, 533 U.S. at 29. The thermal imager used for the scan was an Agema Thermovision 210 (Agema 210) which detects the amount of infrared radiation emitted from objects which the naked eye cannot see. *Id.* The Agema 210 depicts heat images like a video camera. *Id.* at 30. Infrared radiation is converted into images based on relative heat—white reflecting hot images, black reflecting cool images and gray reflecting the relative difference. *Id.* at 29-30. High-intensity lighting is normally required for indoor marijuana growth. *Id.* at 29.

² *Id.* at 30. The thermal image scan took several minutes and was conducted from the passenger seat of the agents' car. *Id.* The agents scanned the front of the house while parked across a street which ran in front of the house and then scanned the back of the house from a street which ran behind the house. *Id.* From the results of the thermal image scan, the agents deduced Kyllo was using high-intensity light to grow marijuana in his home. *Id.*

³ *Id.* The warrant issued by the federal magistrate was also based on tips from informants that Kyllo was growing marijuana in his home and Kyllo's high utility bill. *Id.* Federal agents found over 100 marijuana plants growing under high-intensity halide lights. *Id.*

⁴ *Id.* Kyllo was indicted pursuant to 21 U.S.C. § 841(a)(1) for one count of

Court of Appeals for the Ninth Circuit remanded the case to the district court for an evidentiary hearing regarding the technical aspects of the thermal imager, and the district court reaffirmed the denial of the motion to suppress.⁵ The Ninth Circuit affirmed the ruling of the district court.⁶ The United States Supreme Court granted certiorari and held: reversed.⁷ When law enforcement officials employ technology not commonly used by the general public to gather information about the interior of a home that could not be otherwise obtained without physical invasion of the home, the use of the technology constitutes a search for Fourth Amendment purposes and is unconstitutional without a warrant.⁸

II. RELATED LAW

The Fourth Amendment to the United States Constitution limits law enforcement investigative practices by forbidding unreasonable searches and seizures.⁹ Throughout the course

manufacturing marijuana. *Id.* The district court denied Kylo's motion to suppress the evidence gathered from his home. *Id.*

⁵ *Id.* The district court found that the Agema 210 was "a non-intrusive device" that only showed a "crude visual image" of the house based on the level of heat emitted from the home. *Id.* The district court also found that the Agema 210 could not penetrate a structure to reveal people, activities or other intimate physical details inside the home, nor did the device emit beams or rays which intruded into the home. *Id.* The district court again denied the motion to suppress the evidence gathered from Kylo's home and upheld the validity of the warrant issued by the federal magistrate. *Id.*

⁶ *Kyllo*, 533 U.S. at 30-31. The Ninth Circuit originally reversed the district court's determination that the warrant was valid. *Id.* at 30. After a change in composition, the Ninth Circuit withdrew its opinion and upheld the district court's determination that the warrant was valid. *Id.* at 31. The appellate court held that Kylo had not demonstrated a subjective expectation of privacy because he failed to make an effort to conceal the heat emitted from his home and that he had no objectively reasonable expectation of privacy because the thermal imaging did not reveal any private details of his life. *Id.*

⁷ *Id.* at 31, 41. The Court decided *Kyllo* with a majority of five to four Justices. *Id.* at 29.

⁸ *Id.* at 40. The Court determined that the thermal image scan conducted prior to obtaining a warrant was an unlawful search in violation of the Fourth Amendment. *Id.* The Court remanded the case to the district court to determine the validity of the warrant issued without the evidence provided by the thermal image scan. *Id.* at 40-41.

⁹ U.S. CONST. amend. IV ("The right of the people to be secure in their per-

of American history new technological advances in law enforcement surveillance techniques have challenged traditional notions of what constitutes a search under the Fourth Amendment.¹⁰ This section explains the development of the protec-

sons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause"). The framers of the Fourth Amendment were clearly influenced by the abuse of British authorities upon the personal privacy of American colonists and sought protection from unreasonable searches by government authorities in drafting the Amendment. L. Matthew Springer, *A Far Cry from Katz: Deciding the Constitutionality of Prewarrant Thermal Imaging*, 25 OHIO N.U. L. REV. 593, 598 (1999); see *Steagald v. United States*, 451 U.S. 204, 217 (1981) (discussing what types of searches framers would regard as reasonable but stressing importance of interpreting Fourth Amendment in light of current societal norms). See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (discussing what Framers meant by unreasonable searches and seizures).

The Supreme Court has decided that, with few exceptions, searches of a home require a judicially approved warrant based upon probable cause. *Camara v. Mun. Court*, 387 U.S. 523, 528-29 (1967); see *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."). See generally Kevin J. Allen, *Overview of the Fourth Amendment*, 88 GEO. L.J. 883, 884 (2000) (discussing conduct constituting search under Fourth Amendment); Wayne L. LaFave, *The Fourth Amendment: Second to None in the Bill of Rights*, 75 ILL. B.J. 424, 427 (1987) (stating that for Fourth Amendment to apply, "police conduct in question must constitute either a search or seizure as those terms are used in the Fourth Amendment").

¹⁰ Thomas B. Kearns, *Technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy Concerns*, 7 WM. & MARY BILL RTS. J. 975, 980 (1999); see Aaron Larks-Stanford, Comment, *The Warrantless Use of Thermal Imaging and "Intimate Details": Why Growing Pot Indoors and Washing Dishes are Similar Activities Under the Fourth Amendment*, 49 CATH. U. L. REV. 575, 581 (2000) ("In the early stages of its Fourth Amendment jurisprudence, the Supreme Court concentrated upon the physical nature of searches"); see also Richard S. Julie, *High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age*, 37 AM. CRIM. L. REV. 127, 128-29 (discussing property-based literalism and Fourth Amendment).

As surveillance techniques employed by law enforcement agents became more advanced, the Court was forced to modify the property-based interpretation of Fourth Amendment privacy rights to an interpretation which better protected individuals. Larks-Stanford, *supra*, at 578-81; see Stephen J. Wermeil, *The Bill of Rights and the Constitution: Facing the Challenge of the Future*, 27 HUM. RTS. 5, 6 (discussing challenges that new technological advances not requiring physical intrusion present to Constitution and Fourth Amendment); see also Mindy G. Wilson, Note, *The Prewarrant Use of Thermal Imagery: Has This Technological*

tion the Fourth Amendment provides against warrantless searches and seizures.¹¹

A. *The Reasonable Expectation of Privacy Test*

The Supreme Court addressed the issue of the warrantless use of law enforcement surveillance tools in *United States v. Katz*.¹² Katz claimed government agents violated his Fourth Amendment rights by attaching, without a warrant, an electronic listening device to the outside of a public phone booth he used to transmit gambling information.¹³ The Court held that the recording of Katz's conversations by wiretap without a warrant constituted an unreasonable search and seizure under the Fourth Amendment because Katz's expectation of privacy in the phone booth had been violated.¹⁴ The

Advance in the War Against Drugs Come at the Expense of Fourth Amendment Protections Against Unreasonable Searches?, 83 KY. L.J. 891, 896-98 (1995) (discussing Constitutional problems of pre-warrant thermal imaging). See generally Annabelle L. Lisic, *Thermal Imaging and the Fourth Amendment*, 34 MD. B.J. 16, 21 (2001) (discussing capabilities of thermal imaging surveillance); Douglas A. Kash, *Prewarrant Thermal Imaging as a Fourth Amendment Violation: A Supreme Court Question in the Making*, 60 ALB. L. REV. 1295 (1997) (discussing technical aspects of thermal imaging).

¹¹ For an Orwellian view of the future of individual privacy concerns if police surveillance techniques remain unchecked, see Jennifer Murphy, Comment, *Trash, Thermal Imagers, and the Fourth Amendment: The New Search and Seizure*, 53 SMU L. REV. 1645, 1647 (2000). Prior to the Supreme Court's decision in *Kyllo*, federal appeals courts were split on whether thermal imaging implicated the Fourth Amendment. Julie, *supra* note 10, at 134; see *United States v. Ishmael*, 48 F.3d 850, 857 (5th Cir. 1995) (holding that thermal imaging of field did not violate Fourth Amendment); *United States v. Myers*, 46 F.3d 668, 670 (7th Cir. 1995) (holding that thermal surveillance of home did not violate Fourth Amendment); *United States v. Pinson*, 24 F.3d 1056, 1058-59 (8th Cir. 1994). But see *United States v. Cusumano*, 67 F.3d 1497, 1510 (10th Cir. 1995) (holding that thermal imaging of home violates Fourth Amendment), *vacated on other grounds*, 83 F.3d 1247 (10th Cir. 1996) (en banc).

¹² 389 U.S. 347 (1967).

¹³ *Katz*, 389 U.S. at 348. Katz was transmitting wagering information from Los Angeles to Miami and Boston via the public telephone in the booth. *Id.* The conversations were listened to and recorded by FBI agents who had placed the listening device on the outside of the phone booth. *Id.* Katz was convicted for transmitting betting and wagering information over the telephone in violation of federal law. *Id.*

¹⁴ *Id.* at 359. The Court suppressed the evidence gathered by the electronic wiretap and overturned Katz's conviction. *Id.* The Court noted that when law

Court recognized that the Fourth Amendment protects people, not places, from certain kinds of unwarranted governmental intrusions.¹⁵ The Court reasoned that the fact the electronic

enforcement agents violate an individual's Fourth Amendment rights by conducting an unreasonable search or seizure, the evidence gathered pursuant to the unlawful search is usually suppressed. *Id.*; see, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that all evidence obtained by unconstitutional search or seizure is inadmissible in court).

The Court noted that while the Fourth Amendment cannot be interpreted to give a general constitutional right to privacy, it does protect individual privacy from certain governmental intrusions. *Katz*, 389 U.S. at 350. The Court acknowledged that the protection of individual privacy is "left largely to the law of the individual states." *Id.*; see *Breard v. City of Alexandria*, 341 U.S. 622, 640 (1951) (stating that to state and local government falls "duty of protecting [their] private citizens against the practices deemed subversive of privacy"). But see *Oliver v. United States*, 466 U.S. 170, 178 (1984) (emphasizing that Fourth Amendment analysis of whether search has occurred depends upon what society believes are areas that deserve utmost protection from governmental invasion).

¹⁵ *Katz*, 389 U.S. at 351. The Court noted that, outside a few well-established exceptions, searches conducted without a warrant are "per se unreasonable" under the Fourth Amendment. *Id.* at 357; see *Rios v. United States*, 364 U.S. 253, 261 (1960) (stating that warrantless searches are only constitutional if they fall within constitutionally recognized exceptions); see also *Jones v. United States*, 357 U.S. 493, 497-99 (1958) (holding unlawful warrantless search because it did not fall under exceptions). For the well-established exceptions of when a warrantless search will be deemed lawful, see *Henry v. United States*, 361 U.S. 98, 102 (1959), which explains that searches made incident to arrest are justifiable without warrant. See also *Brinegar v. United States*, 160 U.S. 174-77 (1949) (holding that probable cause will justify search without warrant); *McDonald v. United States*, 335 U.S. 451, 454-56 (1948) (discussing that emergency situations do not require warrant); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (holding that automobile may be searched without warrant).

Justice Harlan, in his concurring opinion, articulated a standard by which governmental activity could be evaluated to determine if an individual's Fourth Amendment right to be free from an unreasonable search or seizure had been violated. *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring). Justice Harlan noted that a Fourth Amendment violation occurs if the government conducts a warrantless search that infringes upon an individual who has "exhibited an actual (subjective) expectation of privacy" and the individual's expectation is one "society is prepared to recognize as reasonable." *Id.* This two-pronged test is now known as the "reasonable expectation of privacy test" and is the means for determining whether an individual's Fourth Amendment rights have been violated. *Smith v. Maryland*, 442 U.S. 735, 740-42 (1979). See generally 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE* § 2.1, at 375 (3d ed. 1996) (discussing *Katz*'s "reasonable expectation of privacy" test).

The second part of the *Katz* test has been criticized for failing to provide adequate Fourth Amendment protections in the face of developing technologies.

wiretap did not physically intrude upon the wall of the phone booth was constitutionally insignificant.¹⁶

B. Limits on Warrantless Monitoring

In *United States v. Karo*, the Court determined whether the warrantless monitoring of a beeper in a private residence was constitutional.¹⁷ In *Karo*, government agents used a beeper to track the movement of cans of ether from the point when a government informant shipped them until the defendants used the ether in a cocaine laboratory in a private home.¹⁸ The Court held that the monitoring of the beeper in

Mark D. Kiser, Comment, *Fourth Amendment Search and Seizures and Thermal Imaging*, 51 FLA. L. REV. 723, 725 (1999); see Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 564-65 (1990) (discussing Katz test's inability to provide protection of individual privacy concerns in "high-tech society"); see also Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (criticizing Katz test for being circular and subjective).

¹⁶ *Katz*, 389 U.S. at 353. The Court stressed that what a person knowingly exposes to the public eye is not protected by the Fourth Amendment, but that which an individual attempts to keep private, even in a public area, is protected by the Fourth Amendment. *Id.* at 351-52; see *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (discussing distinction between matters open to public and those individual seeks to keep from public eye). The Court found Katz had attempted to conceal his conversation from the public when he shut the door of the phone booth. *Katz*, 389 U.S. at 352. The Court acknowledged that the protections of the Fourth Amendment did not rest on whether a physical intrusion had occurred and that a search could occur without a physical trespass. *Id.* at 353 (overruling *Olmstead v. United States*, 277 U.S. 438, 464 (1928) (holding that existence of search for Fourth Amendment purposes turned on whether physical trespass had occurred under local property law) and *Goldman v. United States*, 316 U.S. 129, 134-36 (1942) (holding that absent physical intrusion, no search had occurred)). *But see Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978) (discussing that expectations of privacy must be founded upon property rights or other notions outside Fourth Amendment). Justice Harlan stressed that an individual's reasonable expectation of privacy may be defeated by means other than physical intrusion such as electronic surveillance. *Katz*, 389 U.S. at 362 (Harlan, J., concurring).

¹⁷ 468 U.S. 705 (1984).

¹⁸ *Karo*, 468 U.S. at 708-10. The defendants ordered fifty gallons of ether from a government informant and told him they were going to use the ether to extract cocaine from imported clothes. *Id.* at 708. With the consent of the informant, Drug Enforcement Agency (DEA) agents placed a beeper inside one of the cans. *Id.* Using visual surveillance and electronically monitoring the beeper, the DEA agents were able to track the cans of ether from Karo's house to a commercial storage facility, to another commercial storage facility, to another private resi-

the private residence violated the defendants' Fourth Amendment rights because they had a reasonable expectation of privacy in the residence.¹⁹ The Court reasoned that the warrantless monitoring constituted a search because the beeper revealed facts about the interior of the defendants' private home otherwise unattainable without a full-scale warranted search.²⁰

dence, and finally to a private residence rented by defendants. *Id.* at 708-10. The DEA agents obtained a warrant to search the house based in part on information from the beeper and found cocaine and drug laboratory equipment. *Id.* at 710. Karo, along with the codefendants, was indicted for various cocaine offenses. *Karo*, 468 U.S. at 710.

¹⁹ *Id.* at 715-16. The Court also addressed whether any Fourth Amendment rights of the defendants were violated by the initial installation of the beeper. *Id.* at 711-13. The Court concluded that since the informant consented to the installation and the transfer conveyed no information that Karo had tried to hide from public view, the defendants' Fourth Amendment rights were not infringed upon by the initial installation. *Id.* The Court discussed that while the potential for an invasion of privacy was created by the initial installation, none had actually occurred. *Id.* The Court stated that "it is the exploitation of technological advances that implicate the Fourth Amendment, not their mere existence." *Karo*, 468 U.S. at 712.

The Court also held that the warrant issued for the search of the house was valid and contained enough information to establish probable cause without the facts of the monitoring beeper. *Id.* at 721. The Court noted that warrantless searches and seizures inside a home are presumed unreasonable unless exigent circumstances exist to justify the search or seizure. *Id.* at 714-15; see *Payton v. United States*, 445 U.S. 573, 586 (1980) (stating this as "basic principle of Fourth Amendment law"); see also *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1984) (stating that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (discussing that warrant requirement serves as individual's chief protection against unnecessary governmental invasions of private home).

The Court noted that just as a warrantless search of a home is presumed unreasonable, so too would be a warrantless attempt by a government agent to obtain information about a home via an electronic device that could not be obtained from outside the house by observation alone. *Karo*, 468 U.S. at 715.

²⁰ *Karo*, 468 U.S. at 715. The Court acknowledged that the use of the electronic beeper was less intrusive than a search of the home but stressed that the device informed the DEA agents of a "critical fact about the interior" that could not be obtained through visual surveillance. *Id.* Justice Stevens stated that "[w]hen a person's property is concealed from public view . . . then the fact of his possession is private and the subject of Fourth Amendment protection." *Id.* at 731 (Stevens, J., concurring in part and dissenting in part).

The Court distinguished *Karo* from *United States v. Knott* on grounds that in *Karo* this "critical fact" could not be visually verified, while in *Knott* the critical facts were visually verifiable. *Karo*, 468 U.S. at 715; see *United States v. Knott*,

C. Constitutionality of Warrantless Visual Surveillance

In *California v. Ciraolo*, the Court addressed whether warrantless aerial observations of an individual's home violated the Fourth Amendment.²¹ In *Ciraolo*, police flew over Ciraolo's backyard at 1000 feet in navigable airspace and observed a crop of marijuana plants.²² The Court held that Ciraolo's Fourth Amendment rights were not violated by the naked-eye aerial observations of his home.²³ The Court rea-

460 U.S. 276, 285 (1983) (holding no Fourth Amendment search had occurred because information obtained by monitoring of beeper could also have been obtained by visual surveillance); see also *United States v. Place*, 462 U.S. 696 (1983) (holding that canine sniff-test of personal luggage which revealed presence of narcotics was not search for Fourth Amendment purposes). In *Place*, the Court reasoned that the canine-sniff test was not a search because the test did not require the luggage to be opened, it did not expose items which were kept from the public view and it only disclosed the presence of a particular article. *Place*, 462 U.S. at 707. The Court noted that a canine-sniff test is in a class of its own as a law enforcement procedure because of the limited manner and information that is revealed by such a procedure. *Id.*

In *Karo*, the Court rejected the Government's argument that law enforcement officers should be free to use an electronic device without a warrant to determine whether probable cause exists to believe a crime is or will be committed and whether the monitoring will produce criminal behavior. *Karo*, 468 U.S. at 716. The Court felt such a proposition would dangerously threaten the privacy interests of individuals in matters concealed from the public view inside a home. *Id.*; see *Johnson*, 333 U.S. at 14 ("When the right to privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.").

²¹ 476 U.S. 207, 209 (1986).

²² *Ciraolo*, 476 U.S. at 209-10. Santa Clara police received an anonymous telephone call that indicated Ciraolo was growing marijuana in his backyard. *Id.* at 209. Police could not observe Ciraolo's backyard from the ground because he had enclosed his yard with fencing. *Id.* Two police officers trained in marijuana identification flew over the home and confirmed that Ciraolo was in fact growing marijuana in the backyard. *Id.* Police, on the basis of the aerial observation and anonymous tip, obtained a search warrant for Ciraolo's home and seized seventy-three marijuana plants. *Id.* at 210.

²³ *Id.* at 214-15. The Court applied the analysis set forth in *Katz* to determine whether Ciraolo had a reasonable expectation of privacy that was constitutionally protected. *Id.* at 211. The Court conceded that Ciraolo had probably exhibited the required subjective intent of privacy because of the fence that hid the marijuana from ground level view. *Id.*; see *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (stating subjective prong of *Katz* test is usually satisfied by "taking normal precautions to maintain . . . privacy"). However, the Court refused to acknowledge Ciraolo's expectation as one society was prepared to recognize as reasonable.

soned that the Fourth Amendment does not require law enforcement officers to obtain a warrant in order to conduct visual surveillance that is nonintrusive.²⁴

Ciraolo, 476 U.S. at 212.

The Court noted that since the police conducted observations in public airspace in a physically noninvasive manner, and anyone flying over Ciraolo's home could have looked down and seen the crop, Ciraolo's expectation of privacy was unreasonable and therefore not constitutionally protected. *Id.* Ciraolo argued that since his backyard was within the "curtilage" of his home, no search of the area could be conducted unless pursuant to a warrant. *Id.* at 212; see *Oliver v. United States*, 466 U.S. 170, 180 (1984) (defining curtilage to be "area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life"). In rejecting this argument, the Court ruled that because the area is within the curtilage of the home does not in and of itself prevent all forms of public observation. *Ciraolo*, 476 U.S. at 213.

²⁴ *Id.* at 213-14. The Court noted that the Fourth Amendment protections of a home do not preclude a law enforcement officer from conducting visual surveillance from a public place where the activities are visible. *Id.* at 213; see *Knott*, 460 U.S. at 282 (stating police may supplement sensory observations with scientific or technological enhancements without violating Fourth Amendment).

The Court would revisit the issue of whether aerial surveillance constitutes a search for which a warrant was required in 1989. *Florida v. Riley*, 488 U.S. 445, 448 (1989). In *Riley*, police officers observed, from a helicopter flying at an altitude of 400 feet, the interior of Riley's greenhouse which was enclosed on all sides and partially covered. *Riley*, 488 U.S. at 448. With the naked eye, the police officers saw what they believed to be marijuana plants growing in the greenhouse and obtained a search warrant based on that visual inspection. *Id.* at 440-49. The search revealed that Riley was in fact growing marijuana in the greenhouse. *Id.* Riley argued that the visual surveillance was a search for which a warrant was required under the Fourth Amendment. *Id.* at 448-50. The Court rejected this argument and, applying the same principles as *Ciraolo*, held that the Fourth Amendment does not require a warrant to observe what is visible to the naked eye. *Id.* at 449-50. The Court noted that while Riley may have intended for his greenhouse to be private, it was unreasonable to expect the inside of the greenhouse to be free from overhead observation when he left it partially uncovered. *Riley*, 488 U.S. at 450. The Court stressed that no intimate details of the home were revealed nor did the flight interfere with Riley's use of his home. *Id.* at 452.

On the same day *Ciraolo* was decided, the Court addressed whether taking aerial photographs from navigable airspace constituted a search for which a warrant was required. *Dow Chem. Co. v. United States*, 476 U.S. 227, 234 (1986). In *Dow Chemical*, the Environmental Protection Agency (EPA) hired a commercial aerial photographer to take photographs of Dow's chemical plant after Dow refused the EPA's request for an on-site inspection. *Dow Chem.*, 476 U.S. at 229-30. The Court held that taking aerial photographs from navigable airspace without a warrant did not violate Dow's Fourth Amendment rights. *Id.* at 239. The Court noted that while the photographs did reveal more information than a naked-eye view, the photographs were "not so revealing of intimate details as to raise con-

D. Warrantless Searches of Items Exposed to the Public

The Court addressed whether a warrantless search of garbage left outside the home violated the Fourth Amendment in *California v. Greenwood*.²⁵ In *Greenwood*, police used evidence indicating narcotics use that was gathered from Greenwood's curbside garbage to show probable cause for a search warrant of his home.²⁶ The Court held the Fourth Amendment does not prohibit a warrantless search of garbage left for collection outside the home.²⁷ The Court reasoned

stitutional concerns." *Id.* at 238. However, the Court recognized that the use of "highly sophisticated surveillance equipment not generally available to the public" could be prohibited by the Fourth Amendment. *Id.* The Court also acknowledged that an electronic device that penetrated the walls of the complex would pose a serious constitutional problem. *Id.* at 239.

²⁵ 486 U.S. 35, 37 (1988).

²⁶ *Greenwood*, 486 U.S. at 37-38. The search of Greenwood's home revealed evidence of narcotics trafficking. *Id.* Police learned of the narcotics shipment en route to Greenwood's home through an informant and were told by a neighbor that Greenwood received frequent late-night visitors who only stayed for a few minutes. *Id.* at 37. Police asked the garbage collector to pick up Greenwood's trash left at his curb and turn it over to police. *Id.* The trash revealed evidence of narcotics use. *Id.* at 37-38.

²⁷ *Id.* at 40-42. The Court, reiterating the standard set forth in *Katz*, noted that the search and seizure of the garbage would only be a violation of Greenwood's Fourth Amendment rights if he had an actual expectation of privacy in his garbage left at curbside that society would recognize as reasonable. *Id.* at 39; see *Oliver*, 466 U.S. at 178 (Powell, J., concurring) (discussing how Court determines what expectations of privacy society is prepared to recognize). In his concurrence in *Oliver*, Justice Powell noted that the Court considers the intent of the framers of the Fourth Amendment, how an individual uses a particular location and the fact that society dictates that certain areas receive a higher degree of protection from unwarranted governmental invasions when determining whether society would recognize the expectation of privacy as reasonable. *Id.*; cf. *Rakas v. Illinois*, 439 U.S. 1238, 152-53 (1978) (stating that no single factor predicts whether individual has legitimate expectation of privacy in place).

The Court again stressed that law enforcement officers are not compelled to shut their eyes to evidence of criminal activity that is in plain sight of the public. *Greenwood*, 486 U.S. at 41. The Court also refused Greenwood's assertion that California state law gave him a right of privacy in his garbage. *Id.* at 43-44. The Court noted that whether a search is reasonable turns not on the law of the state but upon the societal understanding of what areas are protected from unwarranted governmental invasions. *Id.* The Court concluded that society did not acknowledge garbage as being an area protected from governmental invasion. *Id.* The Court also held that California was not in violation of the Due Process

that Greenwood did not have an objectively reasonable expectation of privacy in the garbage because it was left in a public area for the purpose of transferring it to a third party.²⁸

III. *KYLLO V. UNITED STATES*

A. *Opinion of the Court*

In *Kyllo v. United States*,²⁹ the Supreme Court held that when law enforcement officials employ technology not commonly used by the general public to gather information about the interior of a home that could not be otherwise obtained without physical invasion of the home, the use of the technology constitutes a search for Fourth Amendment purposes and is unconstitutional without a warrant.³⁰ The Court imme-

Clause of the Fourteenth Amendment when it used a balancing test to determine whether evidence of criminal activity gathered in violation of state law should be admitted or excluded. *Id.* at 44-45.

²⁸ *Greenwood*, 486 U.S. at 40. In rejecting Greenwood's argument that he had exhibited an expectation of privacy in the garbage, the Court noted that it is generally accepted knowledge that garbage is often accessible to "animals, children, scavengers, snoops, and other members of the public." *Id.* Therefore, by placing the garbage at the curb, Greenwood had exposed the garbage to the general public and lost the protections of the Fourth Amendment. *Id.*; see *United States v. Katz*, 389 U.S. 347, 351 (1967) (stating that what person exposes to general public is not protected by Fourth Amendment).

The Court also noted that an individual loses his legitimate expectation of privacy in matters voluntarily conveyed to a third party. *Greenwood*, 486 U.S. at 40-41. The Court compared Greenwood placing his garbage curbside to *Smith v. Maryland*. *Id.* In *Smith*, the police installed a pen register at the telephone company to record the numbers Smith dialed from his telephone. *Smith v. Maryland*, 442 U.S. 735, 737 (1979). The Court held that this did not constitute a search under the Fourth Amendment because when Smith dialed numbers he voluntarily conveyed them to a third party losing any legitimate expectation of privacy in the dialed numbers. *Smith*, 442 U.S. at 742-46. The Court noted that unless an individual has a legitimate expectation of privacy, no search warrant is required. *Id.* at 745-46.

²⁹ 533 U.S. 27 (2001).

³⁰ *Kyllo*, 533 U.S. at 40. Justice Scalia delivered the opinion of the Court, in which Justices Souter, Thomas, Ginsberg and Breyer joined. *Id.* at 29. The Court explained that law enforcement officials need a bright line rule for determining which types of surveillance techniques require a warrant. *Id.* at 40. The Court relied upon *Ciraolo* in confidently stating that thermal imaging is not a routine activity conducted by the general public by contrasting thermal imaging to private and commercial flying. *Id.* at 39 n.6. The Court stressed that in determining

diately noted that, as a general rule, the Fourth Amendment prevents warrantless searches of a private citizen's home.³¹ The Court then addressed the issue of whether thermal imaging constituted an unreasonable search within the meaning of the Fourth Amendment.³²

The Court explained that an unreasonable search in violation of the Fourth Amendment occurs when government intrudes upon an individual's subjective expectation of privacy that is recognized by society as reasonable.³³ The Court acknowledged that previous decisions made it clear that visual surveillance of a home without a warrant was not unconstitutional.³⁴ However, the Court noted that technological advances have affected the right of privacy an individual has under the Fourth Amendment.³⁵ Furthermore, the Court stressed that law enforcement officials' use of technology to gather information about the interior of a home erodes a minimum expectation of privacy that society recognizes as reasonable.³⁶ The Court found that the use of a thermal imager was a search under the Fourth Amendment because the scan revealed details of *Kyllo's* home.³⁷

whether a search is unreasonable, not only must the search be analyzed under the original meaning of the Fourth Amendment but also in a way that preserves public interest and private rights. *Id.* at 40 (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

³¹ *Id.* at 31. The Court noted that there were a few exceptions to this rule, but none applied in the instant case. *Id.*

³² *Id.* at 35-40. The Court noted that the question of whether a search had occurred was a difficult question considering previous case law. *Id.*

³³ *Id.* at 33. The Court referred to this standard as the "*Katz* test." *Id.* at 34. The Court acknowledged that in some applications the *Katz* test was difficult, but in a private home, there is a reasonable expectation of privacy that is deeply rooted in common law jurisprudence. *Id.*

³⁴ *Id.* at 31-32. The Court noted that, like the disputed searches at issue in both *Ciraolo* and *Riley*, it did not consider visual surveillance to be a search within the meaning of the Fourth Amendment. *Id.* at 32-33.

³⁵ *Kyllo*, 533 U.S. at 33-34. The question confronted was the point at which the use of technology must be limited in order to preserve the rights of privacy guaranteed by the Fourth Amendment. *Id.* at 34.

³⁶ *Id.* The Court was not prepared, nor willing, to strip individuals of the rights originally guaranteed by the Fourth Amendment. *Id.*

³⁷ *Id.* at 34-35. The Court rejected the Government's argument that the use of the thermal imager was not a search because it only picked up information about the exterior of the house to detect the amount of heat the walls were radiating.

Finally, the Court considered the Government's argument that thermal imaging was constitutional because it did not pick up any intimate details inside the home.³⁸ The Court concluded that any warrantless search, other than visual surveillance, to gather details about the interior of a home is unconstitutional.³⁹

B. Justice Stevens's Dissenting Opinion

Justice Stevens distinguished between law enforcement officials using equipment that directly reveals activities inside a home and using public information to make inferences about the interior of a home.⁴⁰ Justice Stevens rejected the majority's belief that the use of the thermal imager constituted a search within the Fourth Amendment.⁴¹ Justice

Id. at 35. The Court conceded the thermal imaging system used was not as sophisticated as other surveillance systems but noted that the rule of the case was adopted with other state-of-the-art technologies in mind. *Id.* at 36. The Court discarded the notion of a difference between "off-the-wall" and "through-the-wall" technologies by relying on previous decisions, like *Katz*, which had rejected such mechanical distinctions. *Id.* at 35-36.

³⁸ *Id.* at 37. The Government cited *Dow Chemical* in support of this proposition before the Court. *Id.*; see *supra* note 24 and accompanying text.

³⁹ *Kyllo*, 533 U.S. at 40. The Court stressed that any detail about a home is an intimate detail, therefore including the relative warmth of *Kyllo's* home. *Id.* at 38. The Court compared the warmth of *Kyllo's* home to the can of ether in *Karo*. *Id.* at 37-38. The Court stated that the protections of the Fourth Amendment do not turn upon the "quality or quantity" of evidence gathered but rather upon the existence of gathered evidence. *Id.* at 37. The Court noted that allowing law enforcement officials to gather only nonintimate details of a home would require rules stating what was considered intimate and not intimate. *Id.* at 38-39. The Court was not willing to establish such a distinction. *Kyllo*, 533 U.S. at 38-39. The Court also recognized that with such a rule an agent could not know in advance of the surveillance whether the search would be constitutionally permissible because of the possibility of an intimate detail being revealed. *Id.* at 39.

⁴⁰ *Id.* at 41 (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy. *Id.* Justice Stevens argued that the use of the thermal imager should have been classified as "off-the-wall surveillance," which he defined as any surveillance that makes observations about the exterior of the home. *Id.* Justice Stevens contrasted "off-the-wall surveillance" with "through-the-wall surveillance," which directly reveals information about a private area. *Id.*

⁴¹ *Id.* at 42. The dissent believed that since the thermal imager did not penetrate the walls of *Kyllo's* home, did not detect details which were not already exposed to the public and did not reveal any details about the interior of the

Stevens argued that the law enforcement officials merely used the thermal imager to gather information exposed to the public domain and then made inferences from the gathered data.⁴² Justice Stevens criticized the majority for unnecessarily crafting a new rule and lamented that the rule was both too narrow and too broad.⁴³

IV. DISCUSSION

In *Kyllo v. United States*, the Supreme Court defined the Fourth Amendment protections against unreasonable searches and seizures as they are applied to the warrantless use of

home, the use of the thermal imager did not require a warrant. *Id.* at 43.

⁴² *Id.* at 44. The dissent reminded the majority that it was well-settled law that searches of "property in plain view are presumptively reasonable." *Id.* at 42. Justice Stevens argued that since *Kyllo* had exposed the heat emissions to the public, the same principles of *Ciraolo*, *Dow Chemical* and *Greenwood* should apply—that what a person exposes to the public is not protected by the Fourth Amendment. *Id.* The dissent contended that the law enforcement officials concluded from the thermal imager results that *Kyllo* was growing marijuana in his home and that "[i]t would be quite absurd to characterize their thought processes as 'searches.'" *Id.* at 44. The dissent then compared the inference made by the officers to the inferences made in *Greenwood* from the contents of the garbage that the Court ruled constitutional and stated that the majority wrongly "assumes that an inference can amount to a Fourth Amendment violation." *Kyllo*, 533 U.S. at 44 (Stevens, J., dissenting). The dissent asserted that the ruling unnecessarily expanded the Fourth Amendment by characterizing an inference as a search. *Id.* at 44 n.3.

⁴³ *Id.* at 46-47. The dissent argued that the majority's rule was ambiguous because the term "general public use" was too difficult to measure and failed to address that the "threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available." *Id.* at 47. The dissent also argued that the new rule went too far and made unconstitutional all sensory-enhanced technology or equipment, effectively overruling *Place*, where the Court found that a dog sniff was not a search. *Id.* at 47-48.

The dissent contended that simply because something originates inside a home should not provide it with the protection of the Constitution. *Id.* at 48. The dissent also argued that the rule designed to protect individuals from "sense-enhancing equipment should not be limited to a home." *Kyllo*, 533 U.S. at 48 (Stevens, J., dissenting). The dissent was not persuaded by the majority's reasoning behind the new rule and found differences between surveillance methods that disclosed exact contents of the home and those that only revealed relative amounts of heat emanating from a home. *Id.* at 49-50. The dissent commended the majority for addressing how advances in technology could adversely affect privacy rights but believed the majority's attempt at articulating a rule for the future was unwarranted and far-reaching. *Id.* at 51.

sophisticated electronic surveillance equipment by law enforcement officials.⁴⁴ The Court focused on *Kyllo's* reasonable expectation of privacy in his home and that a thermal imager reveals information that could not have been obtained by visual surveillance alone, rather than on the absence of an actual physical intrusion into the home.⁴⁵ The Court provided guidance to law enforcement officials as to which types of surveillance methods require a warrant before they can be employed.⁴⁶

By articulating a new rule to decide the issue of the constitutionality of the use of a thermal imager in *Kyllo*, the Court exposed itself to criticism by formulating an overly broad rule that addresses not only the use of thermal imagers, but other surveillance methods which were not called into constitutional question by the present case.⁴⁷ The implications of *Kyllo* are far-reaching, considering the majority's attempt to craft a rule that addresses the current and future use of state-of-the-art electronic surveillance equipment by law enforcement officials.⁴⁸

⁴⁴ See *supra* notes 16, 20, 30 and accompanying text. *Kyllo* deemed the use of thermal imagers and other state-of-the-art technologies to conduct surveillance of homes a search for which a warrant is required under the Fourth Amendment. See *supra* notes 30, 37 and accompanying text.

⁴⁵ See *supra* notes 19, 20, 31, 39 and accompanying text. The Court's reliance on a violation of an individual's actual expectation of privacy which society recognizes as reasonable by surveillance methods which reveal details not otherwise attainable by the naked eye alone was consistent with previous decisions which determined the constitutionality of the surveillance by examining the reasonableness of the expectation of privacy and the manner in which the information was obtained. See *supra* notes 15, 20, 23-24, 33 and accompanying text.

⁴⁶ See *supra* notes 16, 23-24, 30, 37 and accompanying text. If the device is not in use by the general public and reveals details of the home unattainable by the naked eye, law enforcement officials must obtain a warrant before using the device. See *supra* note 30 and accompanying text.

⁴⁷ See *supra* notes 30, 35, 43 and accompanying text. The use of the term "not in general public use" inserted some ambiguity into the Court's new rule; however, the Court did equate the term to activities which society recognizes as routine. See *supra* notes 30, 43 and accompanying text.

⁴⁸ See *supra* notes 30, 37 and accompanying text. The Court also ratcheted up the protection provided a home by stressing that all private details, not just intimate details, about the interior of a home are protected by the Fourth Amendment. See *supra* note 37 and accompanying text.

The decision in *Kyllo* has given individuals in private homes freedom from warrantless electronic surveillance and monitoring conducted by law enforcement officials.⁴⁹ However, the beliefs and politics of future Justices will determine how the decision fares in the future. That only a slim majority of the Court favors protection of individual privacy concerns over allowing noninvasive electronic surveillance indicates that a change in composition of the Court could alter the current level of Fourth Amendment protection.⁵⁰

V. CONCLUSION

Kyllo v. United States limits the ability of law enforcement officials to employ some types of state-of-the-art electronic surveillance devices in the war on crime. In effect, the new rule of the Court prohibits the use of electronic sense-enhancing surveillance equipment and stems the development of these useful crime-fighting tools. In *Kyllo*, the Supreme Court addressed concerns that individual privacy rights would be completely compromised by technological developments in law enforcement techniques by allowing law enforcement officials to use state-of-the-art sense-enhancing technologies to conduct surveillance of private residences only once the device has become part of routine general use. Future litigation will be centered on whether the device has become part of the general public use, thereby authorizing law enforcement officials to use it. Nevertheless, *Kyllo* offers useful guidance to law enforcement officials as to what types of methods and forms of surveillance are permitted under the Fourth Amend-

⁴⁹ See *supra* notes 19, 20, 35, 36, 39 and accompanying text. However, the Court supported warrantless visual surveillance as an effective and constitutional law enforcement tool, and as devices become part of routine public use, law enforcement officials will be able to employ them in conducting electronic surveillance. See *supra* note 24, 27, 30, 34 and accompanying text.

⁵⁰ See *supra* notes 10-11, 20, 30 and accompanying text. Also affecting individual privacy concerns is the rate at which some of these state-of-the-art devices become part of general public use. See *supra* notes 10, 30, 37 and accompanying text.

ment and appraises law enforcement agencies that the privacy rights of citizens take precedent over the war on crime.

Hunter Carpenter

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